Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 2000

KINROSS COPPER CORPORATION, a foreign corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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3900

QUESTIONS PRESENTED

1. When an unpatented mining right protected by federal law is abrogated by a state regulation prohibiting discharge of nonpolluting mine waters, does a taking occur under the Fifth Amendment's Takings Clause?

2. Is a state regulation that prohibits the discharge of nonpolluting mine waters, and thus prevents an unpatented mining claim on federal lands from being developed, preempted by federal law?

3. Does takings jurisprudence require a property owner to show that it has a property interest in the very thing the state seeks to regulate, rather than merely showing that the effect of the regulation as applied to the petitioner denies it all economic use of a federally recognized property right?

4. Can a state court, under the guise of stating that the holder of an unpatented mining claim never had the right to appropriate water for the mine and, therefore, never had the right to discharge it as a part of its property right, thus avoid a "taking," when at common law it was not a nuisance for a miner to discharge nonpolluting mine waters into streams?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Petitioner Kinross Copper Corporation is Nevada corporation and is a wholly owned subsidiary of Kinross Gold USA, Inc., which is also a Nevada corporation. Kinross Gold USA, Inc. is a wholly owned subsidiary of Kinross Gold Corporation, which is an Ontario, Canada corporation that is publicly held.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kinross Copper Corporation ("Petitioner" or "Kinross") respectfully petitions for a writ of certiorari to review a judgment of the decision of the Oregon Court of Appeals, affirming the Judgment of the Circuit Court for Multnomah County by the Honorable Henry Kantor, Judge.

OPINIONS BELOW

The decision of the Oregon Court of Appeals of *Kinross Copper Corp. v. State of Oregon*, is reported in 981 P.2d 833 (Or. App. 1999), and is reproduced as Appendix A ("App. A"). That court's opinion granting reconsideration and affirming its prior decision is reported in 988 P.2d 400 (Or. App. 1999) and is reproduced as Appendix B ("App. B."). The Oregon Supreme Court's order (SC No. S46982) denying Petitioner's petition for review, with two judges dissenting, is reproduced as Appendix C ("App. C"). The Oregon Supreme Court's order denying Petitioner's petition for reconsideration is reproduced as Appendix D ("App. D"). The letter opinion of the circuit court denying Petitioner's motion for summary judgment and granting the State of Oregon's cross-motion for summary judgment is reproduced as Appendix E ("App. E"). The circuit court's judgment and order of dismissal is reproduced as Appendix F ("App. F").

Petitioner's petition seeking review by the Oregon Supreme Court is reproduced as Appendix G ("App. G"). Petitioner's petition for reconsideration by the Oregon Supreme Court is reproduced as Appendix H ("App. H"). The stipulation of facts entered into by the parties and a part of the record for the cross-motion for summary judgment is reproduced as Appendix I ("App. I").

STATEMENT OF JURISDICTION

The order of the Oregon Supreme Court denying Petitioner's petition for reconsideration of its refusal to review the decision of the Oregon Court of Appeals was entered on June 20, 2000. (App. D.) This Court has jurisdiction in this matter pursuant to 28 U.S.C.A. § 1257(a) (West 1993), because the Oregon regulatory scheme as enforced by the Oregon court is repugnant to the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Oregon Court of Appeals has held that Kinross has no entitlement to compensation under the takings clauses of either the state or federal constitutions. 981 P.2d at 834, 836. (App. A.) The court of appeals considered the state constitutional claim first. *See State v. Campbell*, 705 P.2d 694, 703 (Or. 1985). Having decided the claim adversely to Kinross, the court of appeals then had to address and decide the federal constitutional questions,

which had become dispositive of the action and which are the basis for this Court's jurisdiction.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions at issue in this matter are the Property Clause and Fifth Amendment to the U.S. Constitution. U.S. Const., article IV, § 3, cl. 2, of the Property Clause provides: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

The Fifth Amendment provides, in pertinent part, as follows: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment provides, in pertinent part, as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const., amend. XIV, § 1.

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[1] The court of appeals concluded that a water discharge right, and not the right to mine, is the "property" interest in this case (981 P2d at 837). Kinross has both rights, but complete removal of either one by state regulation effects a justiciable taking of property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992).

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The water discharged from the mine would meet federal and state instream water quality standards, as well as discharge limits for mines promulgated by the U.S. Environmental Protection Agency under the federal Clean Water Act, *see* 40 C.F.R. § 440.104(b)(2)(i) (1999). This regulation is reproduced as Appendix J ("App J"). Federal law allows states to impose water quality standards for discharge on federal lands. 43 U.S.C.A. § 1712(c)(8) (West 1986). A copy of this statute is reproduced as Appendix K ("App. K"). However, the Oregon administrative rule at issue, Or. Admin. R. 340-041-0470(1)-(7) (2000) (known informally as the "Three Basin Rule"), prohibits all water discharges from any industrial source, regardless of water quality, to the North Santiam River Subbasin, in which the proposed mine would be located. A copy of the Three Basin Rule as originally adopted is reproduced as Appendix L ("App. L"), and a copy of that rule as amended is reproduced as Appendix M ("App. M").

STATEMENT OF THE CASE

A. Procedural History.

Petitioner is the lessee of an unpatented mining claims on U.S. Forest Service (the "USFS") lands that were obtained pursuant to the Mining Law of 1872, 30 U.S.C.A. § 22, *et seq.* (West 1986 & Supp. 2000). Petitioner's lessor in 1975 staked a number of mining claims in the Willamette National Forest (the "WNF"), and the following year it discovered a valuable copper ("Bornite") deposit on some of these claims. (App. I-1-2.) In 1977 the Oregon Environmental Quality Commission (the "EQC") adopted an administrative regulation, known as the Three Basin Rule, that prohibited all water discharges into streams within the North Santiam, McKenzie and Clackamas River Subbasins in western Oregon. (App. I-2.)

In June 1991, Petitioner, under its former name, submitted a Plan of Operations for the Bornite Project (the "Plan") to the USFS to develop the claims. (App. I-2-3). While the Plan was undergoing review by the USFS, Petitioner also submitted an application to the Oregon Department of Environmental Quality (the "DEQ") for a National Pollutant Discharge Elimination System ("NPDES") permit that would allow the Bornite Project to discharge groundwater pumped from the mine and other wastewaters into a surface stream adjacent to the Bornite

Project. (App. I-3.) (It is stipulated that all of the waters to be discharged from the mine would meet federal and state water quality standards and would otherwise comply with the federal Clean Water Act. (App. I-6.) Within the North Santiam River Subbasin, however, the Three Basin Rule prohibits all new industrial discharges, including discharges from mining operations, regardless of the quality of the water discharged.)

On April 22, 1993, the USFS Supervisor of the WNF adopted a Record of Decision and Final Environmental Impact Statement that approved the Bornite Project and recognized that the mine would be required to obtain an NPDES permit from the State of Oregon (the "State") to discharge mine waters into Cedar Creek, which is adjacent to the mine site. (App. I-3.)

On May 17, 1993, the U.S. Department of the Army, Corps of Engineers issued Petitioner a nationwide permit (the "NWP") pursuant to 33 C.F.R. part 330 (1999) and section 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (West 1986 & Supp. 2000), authorizing placing fill material in two tributaries of Cedar Creek on the Bornite Project. The NWP was issued based upon the DEQ representation that the proposed Bornite Project would not violate state water quality standards. The DEQ found that if the conditions required by the Corps of Engineers were satisfied, the Bornite Project would comply with the requirements of the federal Clean Water Act and state water

quality standards. The DEQ also issued Petitioner an NPDES permit to discharge storm water from construction activities at the proposed mine and had issued a certification pursuant to section 401 of the Clean Water Act, 33 U.S.C.A. § 1341 (West 1986), that the mine would meet state water quality standards. However, at some point the issue was raised internally at the DEQ whether an NPDES permit to discharge any water from the mine would violate the Three Basin Rule, because on its face it prohibited all discharges without regard to water quality. The DEQ then sought an opinion from the Oregon Attorney General, who opined that the Three Basin Rule prohibited an NPDES permit for discharges within the three watersheds covered by the rule. The DEQ had previously issued approximately 75 NPDES permits for facilities within the three river basins, including the one to Petitioner for the discharge of storm water.

By December 1993, the DEQ had determined that an NPDES permit for the Bornite Project could be issued under which "there would be no measurable impact on the North Santiam River or the Little North Santiam River" but that it was prohibited from doing so because of the Three Basin Rule contained in Or. Admin. R. 340-041-0470(1). (App. I-4.) The director of the DEQ advised the EQC that Kinross required an NPDES permit in order to proceed with the mining project but that it could not do so under a literal reading of the Three Basin Rule. The DEQ recommended

that the EQC amend Or. Admin. R. 340-041-0470(1) because

> the [Three Basin] rule language is broad and effectively prevents the issuance of permits for any new facilities (including new facilities requiring storm water permits) regardless of the impact of the discharge. The rule may effectively preclude development and other activities in these areas that were not intended to be affected by the rule.

(App. I-4-5.) The EQC was further advised that the Three Basin Rule "prohibits development requiring a discharge permit, regardless of the impact on water quality. No exceptions are allowed. This rule, together with the requirements for storm water permits, may have the effect of precluding activities and land uses in these subbasins that were never intended to be precluded." (App. I-5.)

However, the EQC refused to change the Three Basin Rule to allow the DEQ to issue NPDES permits for new industrial waste discharges that did not adversely impact water quality, and the DEQ ultimately denied Petitioner's application for an NPDES permit on March 21, 1995. (App. I-8.) The EQC did amend the rule to allow nonindustrial discharges. The sole ground for denial was that Or. Admin. R. 340-041-0470(1) prohibits the issuance of NPDES permits for new industrial discharges within the North Santiam River Subbasin. Petitioner then took an administrative appeal of that order to the EQC.

On August 30, 1996, the EQC issued a final order adopting the hearings officer-recommended Findings of Fact, Conclusions of Law and Final Order denying Kinross an NPDES permit. (App. I-8.) The denial of an NPDES permit by the EQC was a final administrative action that prevented Petitioner from discharging groundwater and other mine waters into a surface stream.

B. The Case.

In October 1996, Petitioner commenced this action in the state circuit court alleging that the denial of the NPDES permit violated Petitioner's rights under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment because Petitioner was prevented from developing its mining claims as the result of the administrative denial and was thus denied all economically viable use of those claims. In a second count, Petitioner alleged that the Three Basin Rule did not substantially advance any legitimate state interest. Based on the stipulation of facts (App. I), the circuit court granted the state's summary judgment and dismissed Petitioner's claims (App. E, F).

On appeal, the Oregon Court of Appeals affirmed the circuit court's dismissal of the case on the basis (1) that the denial of the NPDES permit did not deny Petitioner the right to mine its claims, but only denied it the right to

discharge water (even though it is a stipulated fact that because of heavy precipitation and high volumes of groundwater, the mine could not operate without an NPDES permit), and (2) that because it was never a part of Petitioner's bundle of property rights to appropriate water for the mine, Petitioner never had a right to discharge water from the mine; therefore, denying it an NPDES permit did not "take" anything. (App. A.) The Petitioner moved the court of appeals for reconsideration, which was granted, but the opinion was adhered to. (App. B.) Petitioner then petitioned for review by the Oregon Supreme Court, which was denied, with two justices dissenting. (App. C, G.) It then petitioned for reconsideration by that court, which was also denied. (App. D, H.)

The trial court decided the motion for summary judgment based on a theory that had not been argued by the state. 981 P.2d at 835-36. The court of appeals based its opinion on a different theory, *i.e.*, that Petitioner did not have the right to appropriate water for the mine as a part of its bundle of property rights, therefore the state could prevent it from discharging any mine waters without it constituting a taking of Petitioner's mining rights. This was a theory the state had also not argued before the court of appeals. *Id.* at 837. Further, the court of appeals was disingenuous in its opinion on reconsideration by stating that Petitioner had not contended that it had a common-law right to discharge nonpolluting mine waters when the matter

was originally before that court. 988 P.2d at 401. In both its opening and reply briefs Petitioner had cited to *Atchison v. Peterson*, 87 U.S. (20 Wall.) 507, 514-15 (1874), for the proposition that a miner had a common-law right to discharge mine water and that it had never been considered to be a nuisance to discharge such waters, even if it had some adverse impacts on downstream users. Appellant's Opening Brief at 18; Appellant's Reply Brief at 8. The court cited, but glossed over discussing, *Atchison* in its original opinion. 981 P.2d at 838.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(b) lists among the considerations governing review on certiorari the circumstance in which a state court of last resort has decided a federal question in a way that conflicts with the decision of a federal court of appeals. In this case the decision was rendered by a lower appellate court and the state court of last resort twice refused to grant review. (App. C, D.) Under Rule 10(c), a ground for review exists when a state court has decided an important question of federal law that has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both of these grounds for review are present in this case.

I. This Case Involves Four Important Constitutional Questions That Should Be Resolved by This Court.

The precedent established by the decision below opens the door wide to allow states to prevent mining on federal lands by simply denying the miner the right to discharge nonpolluting groundwaters and at the same time avoid having to pay just compensation for "taking" those mining claims. It also serves as a precedent for claiming that no taking occurs unless the very thing proscribed by government is identical to the property interest in question. This is directly contrary to this Court's position in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985), that it is "the effect of the denial" that gives rise to a taking. The issue is one of causation. *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("whether a particular restriction will be rendered invalid by the government's failure to pay for any losses *proximately caused* by it depends," etc. (emphasis added)).

As will also be discussed below, if left to stand, a state will be able to use an environmental law to trump the federal Mining Law of 1872 by simply refusing to issue a water discharge permit. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

This Court has long recognized that an unpatented mining claim is an interest in real property protected by the

Fifth Amendment to the U.S. Constitution that vests upon discovery of a valuable mineral deposit. *Belk v. Meagher*, 104 U.S. (14 Otto) 279, 283 (1881). Moreover, an unpatented mining claim is a property interest that, if taken by a government action, entitles the miner to just compensation for that interest. *United States v. Locke*, 471 U.S. 84, 86 (1985); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963). Because the holder of an unpatented mining claim only has a property right to remove minerals, if it is prevented from mining, the claim holder is denied all economically productive use of its property. *Lucas*, 505 U.S. 1003.

Under *Lucas*, the state can only deny a property owner just compensation if the proscribed use would have been a public or private nuisance at common law. *Id.* at 1030.[2] The right of a miner to discharge nonpolluting mine waters from unpatented mining claims on federal lands predates statehood. *Atchison*, 87 U.S. (20 Wall.) 507. Further, the Oregon courts have also long recognized that the discharge of nonpolluting mine waters to a stream is not a common-law nuisance. *Provolt v. Bailey*, 121 P. 961 (Or. 1912); *Carson v. Hayes*, 65 P. 814 (Or. 1901).

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[2] No taking occurs if "[t]he use of these properties for what are now expressly prohibited purposes [*e.g.*, discharge of groundwater] was *always* unlawful . . . ." 505 U.S. at 1030 (emphasis in original). Here, the discharge from unpatented mining claims was always *lawful*.

The opinion below is a part of a growing number of state law cases that seek to circumvent this Court's decision in *Lucas* by redefining the property right in question to say that it was not a part of the landowner's property interest to begin with, rather than determining whether the proposed action could have been enjoined as a common-law public or private nuisance. The Oregon appellate courts have consistently displayed hostility to this Court's Fifth Amendment takings jurisprudence by construing this Court's opinions as narrowly as possible, misconstruing them or circumventing them by reinterpreting the state's property law. *Dolan v. City of Tigard*, 832 P.2d 853, 855 (Or. App. 1992), *aff'd*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994); *Stevens v. City of Cannon Beach*, 835 P.2d 940, 942 (Or. App. 1992), *aff'd*, 854 P.2d 449, 452-57 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (Scalia and O'Connor, JJ., dissenting); *Dodd v. Hood River County*, 855 P.2d 608, 614-15 (Or. 1993); *GTE Northwest, Inc. v. Public Util. Comm'n*, 883 P.2d 255, 257-59 (Or. App. 1994), *rev'd*, 900 P.2d 495, 501-04 (Or. 1995), *cert. denied*, 517 U.S. 1155 (1996); *Benson v. City of Portland*, 850 P.2d 416, 418-20, 425-26 (Or. App.), *rev. denied*, 862 P.2d 1304 (Or. 1993); *Boise Cascade Corp. v. State of Oregon*, 991 P.2d 563, 569-70 (Or. App. 1999) (petition for review by Oregon Supreme Court pending); *Lincoln City Chamber of Commerce v. City of Lincoln City*, 991 P.2d 1080 (Or. App. 1999), *petition for review denied*, 330

Or. 331 (Or. 2000); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1438-42 (1996). Recent opinions by state courts circumventing this Court's takings jurisprudence is not limited to Oregon. *Lambert v. City & County*, 120 S. Ct. 1549 (2000) (Scalia, Kennedy and Thomas, JJ., dissenting from denial of certiorari).

State courts reinterpreting their property law in order to avoid a taking also presents the issue of judicial takings. *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring); Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990); *see also Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *rev'd on other grounds*, 477 U.S. 902 (1986).

II. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal Courts.

The decision of the Oregon Court of Appeals, which the Oregon Supreme Court twice declined to review, subverts this Court's language in *Lucas* that no taking occurs "'if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.'" 981 P.2d at 837 (quoting *Lucas*, 505 U.S. at 1027).

The proscribed use in this case is the discharge of nonpolluting mine waters into a surface stream. The test in

Lucas is whether the proscribed use could be enjoined as a common law public or private nuisance. If not, and if as a result the owner is prohibited from making any economically viable or productive use of his or her property, he or she is entitled to compensation for a taking.

Instead of focusing upon whether the discharge of nonpolluting mine water could be enjoined as a common law nuisance, the court of appeals held that there had been no taking because Petitioner's property interest in the mining claims did not include the right to appropriate water for a beneficial use under Oregon law. *Id.* at 839-40. The court's analysis is seriously flawed for a number of reasons. First, it is undisputed that Petitioner has the right to use up to 5,000 gallons of water per day without seeking an appropriation under Oregon law. *Id.* at 840. Second, there is no evidence that Petitioner could not obtain an appropriation for water in excess of that amount, if it needed one. However, an appropriation of water is not the issue. The issue is the discharge of excess water, which has always been governed by a different set of rules from water appropriations.

An article on mine dewatering describes the distinctions as follows:

> The legal principles applicable to mine dewatering cases are dependent initially at least upon whether there are competing claims to the proprietary use of the percolating waters. If the interceptor asserts a proprietary claim to such waters as against

> other proprietors or appropriators, the rules governing water rights will apply. If, however, the interceptor disclaims any interest in the waters and discharges the same solely for the purpose of ridding the mine workings of such waters, the rules governing the use of one's property will apply. . . . The [latter] has been referred to as a "drainage case" and the [former] a "water case" . . . .

Joseph Novak, *The Legal Dilemma in Dewatering Mines*, 17 Rocky Mtn. Min. L. Inst. 657, 665 (1972) (citation omitted).

This distinction applies in Oregon. Under Oregon common law, and consistent with the common law of all other state jurisdictions, Petitioner holds a right to drain water from its property. The principle was explained by an early commentator as follows: "The reasonable use being use of land (and not necessarily of water if the land may be used without the water), *then drainage is a proper purpose and a reasonable use of land where the land is thereby benefited.*" 2 Samuel C. Wiel, *Water Rights in the Western States* § 1140, at 1067 (3d ed. 1911) (emphasis added). The Oregon Supreme Court interpreted the rule to apply as follows:

> The rule that would best serve in this state, and tend to promote the interest of the people without causing undue hardship, would be to allow the owner of land to turn upon the land of an adjacent owner surface water in such quantities as would naturally drain in that direction by means of artificial drainage even

> though the flow of such water upon the lower tract is accelerated; due regard being observed for the interest of the adjacent owner so as to cause no unreasonable inconvenience.

Harbison v. City of Hillsboro, 204 P. 613, 618-19 (Or. 1922).

The Oregon Supreme Court reaffirmed the foregoing rule in *Garbarino v. Van Cleave*, 330 P.2d 28 (Or. 1958). The state stipulated in this case that Petitioner's drainage of water from its property would not result in any measurable pollution (App. I-6), so the proposed discharge clearly meets the common law test in that it will "'cause no unreasonable inconvenience'" to any other landowner. 330 P.2d at 30 (citation omitted). Accordingly, Petitioner, as a part of its property interest in unpatented mining claims, does have a common-law right of drainage that has been "taken" by imposition of the Three Basin Rule. *Accord Provolt*, 121 P. 961; *Carson*, 65 P. 814. An unpatented mining claim can only be used for one purpose; the state's denial of an NPDES permit has deprived the unpatented claims of all economically productive use as a mine, which constitutes a taking entitling Petitioner to just compensation under the Fifth Amendment. *Lucas*, 505 U.S. at 1027.

The second important issue that this Court needs to address is causation. The court below also took the position that there had been no taking because the subject rule

merely proscribed the discharge of mine waters but did not prohibit mining. 981 P.2d at 837. (It is a stipulated fact that the mine would have to discharge excess groundwater in order to operate (App. I-3).) That position is in conflict with this Court's opinion in *Riverside Bayview*, 474 U.S. 121. In that case, the landowner had been denied a permit under the Clean Water Act, 33 U.S.C.A. § 1251, *et seq.* (West 1986 & Supp. 2000), to fill in wetlands, and therefore it claimed a taking of its property. This Court stated: "Whether the denial of a permit would constitute a taking in any given case would depend upon *the effect of the denial on the owner's ability to put the property to productive use.*" *Riverside Bayview*, 474 U.S. at 127 n.4 (emphasis added); *see also Penn Central*, 438 U.S. at 124 ("proximately caused"); *Bowles v. United States*, 31 Fed. Cl. 37, 49 (1994) ("but for" test); Jan G. Laitos, *Law of Property Rights Protection: Limitations on Governmental Powers* § 10.07[A], at 10-44 & § 10.07[A][2], at 10-48 (Supp. 2000).

This case also conflicts with two opinions of the U.S. Court of Appeals for the Federal Circuit. *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984), *cert. denied*, 488 U.S. 854 (1988), also involved unpatented mining claims on federal lands. In *Skaw*, the Federal Circuit held that because the newly enacted Wild and Scenic Rivers Act prevented mining along the St. Joe River in Idaho, miners with valid unpatented mining claims would be entitled to

just compensation for a regulatory taking based on the Fifth Amendment. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), 18 F.3d 1560 (Fed. Cir. 1994), is even more analogous to the present case. As in *Riverside Bayview*, the plaintiff in *Florida Rock* had been denied a Clean Water Act permit, which prevented it from mining limestone because removal of the rock left a hole in wetlands that filled with water causing "temporary pollution by turbidity which, however, would not be a menace to the drinking water." 791 F.2d at 895-96. The Federal Circuit held in the second appeal that a taking of the quarry property was caused by the Corp of Engineers' refusal to issue the permit. 18 F.3d at 1573. As in this case, the denial of a water pollution permit did not prevent the plaintiff in *Florida Rock* from mining, but it was not feasible to mine its property without one.

Riverside Bayview, *Skaw* and *Florida Rock* were all brought to the attention of both the Oregon Court of Appeals and the Oregon Supreme Court to no avail. The court of appeals ignored discussing them, and the Oregon Supreme Court refused to grant review.

A third important issue involves whether the federal Mining Law of 1872 preempts enforcement of the Three Basin Rule. This Court's opinion in *Granite Rock*, 480 U.S. at 580, 583, 593, involved a facial challenge to a state environmental law that imposed a state permit requirement on the operation of unpatented mining claims on federal

lands. In holding that the state law on its face was not preempted, this Court went on to state: "The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable." *Id.* at 587.

While the USFS requires miners within national forests to comply with state water quality standards, neither by statute nor regulation does federal law allow states to prohibit outright any water discharge from mining claims on federal lands. 43 U.S.C.A. § 1712(c)(8) (App. K); 36 C.F.R. § 228.8(b) (1999). Unlike *Granite Rock*, this case involves a prohibition that prevents mining of unpatented claims on federal lands; the Three Basin Rule not only makes mining "commercially impracticable," it makes it physically impossible. Such a prohibition is preempted by federal law.

Further, when the Three Basin Rule was amended shortly before the EQC issued its final order denying Petitioner an NPDES permit, it ceased to be an environmental rule and became a land use regulation. The amended Three Basin Rule proscribes new NPDES wastewater discharge permits for industrial applicants, but it expressly allows a number of other wastewater discharges, many of which may have substantial adverse effects on water quality. Nonetheless, the rule absolutely forbids wastewater discharges from Petitioner's mine, even though

it is stipulated that those discharges would meet state and federal instream water quality standards and other requirements under the federal Clean Water Act. It is only because the mine happens to lie within the North Santiam River Subbasin, one of the three basins subject to the Three Basin Rule, that DEQ refused to issue an NPDES permit for discharges from the mine.

Because the Three Basin Rule is preempted by federal law, Petitioner is entitled to compensation for a temporary taking under *First English Evangelical Lutheran Church v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987).

CONCLUSION

Mining in the western United States has played a major role since the earliest days of settlement. Congress enacted the Mining Law of 1872 to encourage the development of minerals on public lands. The right to discharge nonpolluting mine waters has always been a part of a miner's property interest in unpatented mining claims, and from the earliest days it has never been considered either a public or private nuisance to do so. The lower courts' holding that a property owner must have an appropriation right in order to discharge excess water is of special importance in the western United States and inconsistent with more than 150 years of water law in those states.

In enacting the Mining and Mineral Policy Act of 1970, § 2, 30 U.S.C.A. § 21a (West 1986), Congress emphasized that an "economically sound and stable domestic . . . industr[y]" is important to both our economy and national security. A state should not be allowed to thwart that policy with impunity by preventing the discharge of nonpolluting waters from mining claims on federal lands and not having to pay just compensation for the minerals that cannot be mined.

This case is closely watched by the mining industry and other property owners that must be able to discharge excess groundwater in order to put their land to a beneficial

use. The precedent established by the Oregon courts that the state can stop all productive use of lands by simply denying the right to discharge nonpolluting waters into a stream can have very wide ramifications. Nor is the issue limited to the western United States. If there is no right to discharge nonpolluting waters, and the courts can disregard the nuisance issue, then cases such as *Riverside Bayview* involving the draining of wetlands also come into question. *See* Laitos, *supra*, § 8.02[E], at 8-23 to 8-24 (Supp. 2000).

A vocal segment of the population has become increasingly active in trying to stop all commercial activities on federal forest lands through the use of state regulations. The unwillingness of the EQC in this case to amend the Three Basin Rule to allow nonpolluting water discharges, while changing the rule to allow discharges from nonindustrial sources, is just one example of their efforts. That segment views mining, grazing and logging, all of which Congress has authorized can be done on federal forest lands, as harmful to nature. As one law professor has stated: "The natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it." James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Envtl. L. 735, 737 (1993). That is also the view of the author of the article that the trial court relied upon in granting the state summary judgment and dismissing this case, which

even the state conceded and the court of appeals recognized was "at odds with 'traditional takings analysis.'" 981 P.2d at 836; *see* Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 Ecology L.Q. 57 (1997).

In reversing the Oregon appellate courts in *Dolan*, this Court had to remind them that "the Takings Clause of the Fifth Amendment [is] as much a part of the Bill of Rights as the First Amendment or Fourth Amendment . . . ." 512 U.S. at 392. Unfortunately it is a lesson the Oregon courts have not heeded. They and many other lower courts have been quick to take the words of this Court in *Lucas* "that the proscribed use interests were not part of his title to begin with" as creating new avenues for avoiding a taking, rather than analyzing whether the proscribed use was a common-law nuisance. 505 U.S. at 1027; *see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1251 (D. Nev. 1999). This Court needs to refocus all of the lower courts on the fact that if the proscribed use was not a common-law nuisance, the owner is entitled to compensation if he or she has been denied all economically productive use of his or her property interest.

Petitioner respectfully urges the Court to grant the Petition for Writ of Certiorari.

Dated this 14th day of September.

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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 2000

KINROSS COPPER CORPORATION, a foreign corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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1044P

TABLE OF APPENDICES

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B	10/13/99 Oregon Court of Appeals' Opinion on Reconsideration (affirming prior decision), *Kinross Copper Corp. v. State of Oregon*, 988 P.2d 400 (1999)
C	2/29/00 Oregon Supreme Court's Order Denying Review (No. S46982)
D	6/20/00 Oregon Supreme Court's Order Denying Reconsideration (No. S46982)
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I	3/27/97 Multnomah County Circuit Court Stipulated Statement of Facts
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K	43 U.S.C.A. § 1712(c)(8) (West 1986)
L	Three Basin Rule, Oregon Administrative Rule, OAR 340-041-470 (as originally adopted)
M	Three Basin Rule, OAR 340-041-0470(1)-(7) as amended

FILED: May 19,1999

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION,

Appellant,

v.

STATE OF OREGON,

Respondent.

(960906900; CA A98316)

Appeal from Circuit Court, Multnomah County.

Henry Kantor, Judge.

Argued and submitted May 13, 1998.

Before Landau, Presiding Judge, Deits, Chief Judge,
and Wollheim, Judge.

LANDAU, P.J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[x] Costs allowed, payable by: Appellant
[ ] Costs allowed, to abide the outcome on remand, payable by:

LANDAU, P. J.

In this inverse condemnation case, plaintiff Kinross Copper Corporation seeks compensation for the value of its unpatented mining claims, which it contends has been reduced to zero as a result of the state's denial of a permit to discharge wastewater that would result from plaintiff's proposed mining operations. Plaintiff alleged a right to compensation under the takings clauses of both the federal and state constitutions. The trial court entered summary judgment in favor of the state on both claims. We affirm.

The parties stipulated to the relevant facts. In 1975, Amoco Minerals Company (Amoco) staked unpatented mining claims in the Cedar Creek Valley of the North Santiam River Subbasin in the Willamette National Forest. An "unpatented" mining claim refers to a possessory interest in minerals only, with the federal government retaining ownership of the land on which minerals may be located. *See*

generally 4 *American Law of Mining* § 110.02(1)(b) (2d ed 1998). Individuals who hold such claims have the exclusive right to possession and enjoyment over them, "so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title * * *." 30 USC § 26 (1994). To acquire an unpatented mining claim, it is necessary to discover a valuable mineral deposit. 30 USC § 22 (1994). To hold the claim, it is necessary to establish that the mineral deposit can be extracted, removed, and marketed at a profit. *See generally Chrisman v. Miller*, 197 US 313, 322-23, 25 S Ct 468, 49 L Ed 770 (1905). In 1976, Amoco discovered a body of copper ore on its claims.

In 1977, the Oregon Environmental Quality Commission (EQC) promulgated OAR 340-41-470(1), commonly known as the "Three Basin Rule." That administrative rule prohibits "any new or increased waste

discharges" to the Clackamas, McKenzie, or North Santiam River Subbasins.

In 1989, Amoco leased the unpatented mining claims to plaintiff. Two years later, plaintiff developed a plan of operations for a copper ore mining project. The plan required plaintiff to discharge groundwater pumped from the mine, along with other wastewater, into the North Santiam River Subbasin. The plan included obtaining applicable permits, including a National Pollutant Discharge Elimination System (NPDES) permit under the applicable state and federal clean water laws.

In 1992, plaintiff submitted to the Oregon Department of Environmental Quality (DEQ) an application for an NPDES permit. DEQ conducted various tests and concluded that, under the terms of plaintiff's proposed plan of operations, the discharge would not cause applicable water quality standards to be violated. DEQ also concluded that

alternatives to discharging wastewater from the proposed mining operation were not viable and that, without an NPDES permit, plaintiff would not be able to develop and operate its proposed copper mine. In 1995, however, DEQ denied plaintiff's application for an NPDES permit on the ground that the Three Basin Rule prohibits *any* new waste discharges into the North Santiam River Subbasin. Plaintiff requested a contested case hearing before the EQC on the denial of the permit application. In 1996, EQC issued a final order denying plaintiff's application.

Plaintiff then initiated this action for damages. Plaintiff alleged claims for relief under the takings clauses of both the state and federal constitutions. Plaintiff moved for summary judgment on its federal takings claim on the ground that the denial of its NPDES permit rendered its unpatented mining claims entirely valueless and thus constituted a *per se* taking. The state moved for summary judgment on both

claims on the ground that the denial of the NPDES took no property right of plaintiff's. According to the state, because unpatented mining claims are held subject to state regulation, plaintiff never had the right to develop its claim in violation of state law.

The trial court denied plaintiff's motion, granted the state's motion, and entered judgment for the state on both claims. In a letter opinion, the trial court explained that, because holding an unpatented mining claim requires proof that the claim continues to be marketable, and, because state regulations render plaintiff's claims unmarketable, plaintiff's mining claims were "extinguished," leaving plaintiff with no property right that could be taken. The extinguishment of the claim did not amount to a taking, the court held, because unpatented mining claims constitute a unique form of property right that--by definition--is subject to state and federal regulatory authority and is more appropriately

regarded as analogous to a contract right that is subject to a condition subsequent. The trial court cited as authority for its conclusion a law review article, Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 Ecology L Q 57 (1997).

On appeal, plaintiff assigns error to both summary judgment rulings. It contends that the trial court erred in adopting the reasoning of the cited law review article because it is contrary to nearly a century of takings case law. Amicus Northwest Mining Association expands on that contention, arguing that unpatented mining claims have long been recognized as property subject to the protections of the federal and state constitutions.

The state concedes that the trial court's rationale is at odds with "traditional takings analysis." It nevertheless contends that the trial court correctly concluded that plaintiff lost no property right because, among other things, plaintiff

never had the right to discharge wastewater into a state waterway. Amicus North Santiam Watershed Council (Council) expands on that alternative argument and asserts that holders of unpatented mining claims do not have a property right to discharge wastes into state rivers.

Plaintiff responds that the argument is not "preserved" and, in any event, is incorrect. According to plaintiff, it does indeed have a right to discharge water from its mining operation, first, because the federal Mining Act of 1866 recognized a miner's rights through custom and other laws to use water on federal lands and, second, because state law provides that industrial water users have the right to use up to 5,000 gallons of groundwater per day without a permit.

In reviewing the trial court's rulings, we determine whether there is a genuine issue of material fact and whether the prevailing party is entitled to judgment as a matter of law. ORCP 47 C. In this case, the facts are undisputed; the sole

question before us is whether the trial court correctly concluded that the state was entitled to judgment as a matter of law, that is, that plaintiff suffered no taking of property under the state or federal constitutions.

Article I, section 18, of the Oregon Constitution provides that "[p]rivate property shall not be taken for public use, * * * without just compensation[.]" The Fifth Amendment to the United States Constitution likewise prohibits the taking of private property for public use without just compensation. US Const, Amend V.

Identifying the extent to which governmental action short of outright physical acquisition of private property may constitute a taking of property under the state or federal constitutions has proved to be extraordinarily vexing for the courts. Various--sometimes even conflicting--tests have been invoked in countless cases over the last 75 years since Justice Holmes first penned the familiar, albeit cryptic, *dictum* that

"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Penna. Coal Co. v. Mahon*, 260 US 393, 415, 43 S Ct 158, 67 L Ed 322 (1922).

But through the years and the cases, a few principles safely may be asserted as having been settled. Two such principles pertain to this case. The first is that, regardless of the difficulty of describing the exact point at which governmental action is transformed from constitutional regulation to unconstitutional taking, under both state and federal constitutions, government action that deprives property of *all* value without compensation is an unconstitutional taking. The precise formulation varies from case to case, but the gist is the same. Thus, under the Oregon Constitution, an action for inverse condemnation may be maintained to recover damages against a governmental agency that has taken action that has the effect of depriving

the owner of "all economically viable use" of its property. *Boise Cascade Corp. v. Board of Forestry (S42159)*, 325 Or 185, 197-98, 935 P2d 411 (1997). Similarly, under the federal constitution, an action for inverse condemnation may be maintained for damages against a government agency that has taken action that has deprived the owner of "all economically beneficial use" of the property. *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992).

The second settled principle of takings law is that, even if government action might otherwise constitute a taking of property, it will not if it is shown that what the government prohibits does not amount to a private property right in the first place. Said another way, an owner cannot maintain an action for loss of a property right that it did not ever have. Thus, for example, the Oregon Supreme Court held that owners of "dry sand" areas of the Oregon coast cannot be

heard to complain of the loss of the right to exclude the public from those areas, because it is a "right" that they never possessed. *Stevens v. City of Cannon Beach*, 317 Or 131, 136-43, 854 P2d 449 (1993), *cert den* 510 US 1207 (1994); *see also Northwest Natural Gas Co. v. City of Portland*, 300 Or 291, 312, 711 P2d 119 (1985) (public utility could not maintain takings claim for costs of relocating utility facilities to make room for light-rail construction because utilities never possessed a property right to locate their facilities at any particular place). Similarly, the United States Supreme Court explained that even regulation that deprives land of all economically beneficial use will not give rise to takings liability "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 US at 1027.

In this case, plaintiff contends that the denial of its application for an NPDES permit as a precondition to conducting a copper mining operation constitutes a taking of property under both state and federal constitutions. It is stipulated that the effect of the denial deprives plaintiff's unpatented mining claims of all of their economic value. The only question before us is whether, as the United States Supreme Court phrased it in *Lucas*, "the proscribed use interests were not part of [plaintiff's] title to begin with." 505 US at 1027.

It bears emphasis that the focus of the inquiry is the extent to which the "proscribed use" is part of plaintiff's title. That is to say, the determinative inquiry is whether *what the government has prohibited* is itself a property right. The matter bears emphasis because it is not the principal focus of plaintiff's briefing and argument. Plaintiff argues that it has suffered an uncompensated taking, because it has been

deprived of the right to mine copper as otherwise permitted by its unpatented mining claim. But the decision of the EQC did not prohibit plaintiff from mining. It prohibited plaintiff from discharging wastewater into the North Santiam River Subbasin. In consequence, to maintain its takings claim against the state, plaintiff must show that the denial of its NPDES permit application deprived it of a property right; that is to say, plaintiff must show that it had a right to discharge its wastewater into a river of the state. If plaintiff did not have the right to discharge wastewater into the river basin, it cannot complain that it has suffered an uncompensated taking.

Plaintiff initially contends that it should not have to address that question, because it was not the focus of the trial court's decision and was not argued by the state below. As the state correctly asserts, however, a trial court may be "right for the wrong reason," that is, we may affirm on grounds

different from those on which the trial court based its decision, so long as there is evidence in the record to support those alternate grounds. *State v. Nielsen*, 316 Or 611, 628-32, 853 P2d 256 (1993); *State v. Lawson*, 127 Or App 392, 395, 872 P2d 986, *rev den* 320 Or 110 (1994).

In any event, the argument that the state and the Council raise in support of the trial court's decision varies only slightly from what the state asserted below. Before the trial court, the state asserted that plaintiff suffered no taking, because no property right had been taken, and it asserts the same theory on appeal. *See State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988) (drawing distinction between raising an issue at trial, identifying a source for a claimed position, and making a particular argument). We turn, then, to the merits of the parties' arguments about whether the denial of an application for an NPDES permit to discharge mining

wastewater constitutes a deprivation of a private property right.

At common law, an owner of land possessed a right to the natural flow of water running through the owner's land. The right was an incident of ownership of the land and did not depend on the owner's actual appropriation of the water for beneficial use. *See generally* Joseph W. Dellapenna, *The Right to Consume Water Under "Pure" Riparian Rights*, 1 WATERS AND WATER RIGHTS 205, 219 (Robert E. Beck ed 1991).

During the nineteenth century, the federal government began to permit the mining of public lands in the West. Because the government retained title to the land itself, the traditional rules of riparian rights did not readily apply to the use of waters running through the mining claims. Mining customs developed over time, however, to fill the need of the times. One such custom was that rights to use water in

mining operations could be obtained as an incident of the mining activity and that competing claims to the use of the water would be determined by the time of actual appropriation of the water for that use. *See generally* John N. Pomeroy, *A Treatise on the Law of Water Rights* § 14 (1893) ("Water was an indispensable requisite for carrying on mining operations; a permanent right to use certain amounts of water was as essential as the permanent right to occupy a certain parcel of mineral land."). That right included the right to discharge into a stream, although the right of discharge did not include mining debris that could wash on to the land of another. *See, e.g.*, *Carson v. Hayes*, 39 Or 97, 105-06, 65 P 814 (1901) ("The doctrine of the authorities is that each mine owner or proprietor must take care of his own mining debris, and he can acquire no right, by custom or otherwise, to use the land of his neighbor as a dumping ground, without his consent, either by carrying and depositing

depositing the debris thereon, or by casting it into the stream, and allowing it to be washed down by the force of the current[.]").

In time, western states began to adopt the doctrine of "prior appropriation" as a general rule of water rights. Under the rule of prior appropriation, water rights are determined not as an incident of land ownership, but as a function of actual diversion of water to a recognized beneficial use. *See generally*, Wells A. Hutchins, US Dep't of Agriculture, 1 *Water Rights Laws in the Nineteen Western States*, 440-42 (1971). Oregon law during the years following statehood began with adherence to the common law of riparian rights, but, by the turn of the century, the courts moved toward the rule of prior appropriation. *See generally* Janet C. Neuman, *Oregon*, 6 WATERS AND WATER RIGHTS 699 (Robert E. Beck ed 1991); Wells A. Hutchins, *The Common-Law*

Riparian Doctrine in Oregon: Legislative and Judicial Modification, 36 Or L Rev 193, 196-97 (1957).

Congress recognized the rule of prior appropriation in the Mining Act of 1866, 30 USC § 51 (1994), which provides:

> "Whenever, by priority of possession, rights to the use of water for mining * * * have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same * * *."

See also Atchison v. Peterson, 87 US (20 Wall) 507, 514-15, 22 L Ed 414 (1874). Congress reaffirmed that recognition in the Mining Act of 1870, 30 USC § 52.

The basic grant of unpatented mining claims originated in the Mining Law of 1872, 30 USC §§ 22-47 (1994). *See generally* 4 *American Law of Mining* § 110.02 (1998). The 1872 law effected no change to the preexisting recognition of the state water rights rules pertaining to

mining claims. A later enactment did, however. The Desert Land Act of 1877 permits the entry and reclamation of "desert" land with a proviso that the right to the waters by a claimant depends on prior appropriation, subject to an additional proviso:

> "[A]ll surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

43 USC § 321 (1994).

In *Hough v. Porter*, 51 Or 318, 95 P 732, 98 P 1083 (1909), the Oregon Supreme Court held that the second proviso had the effect of severing title to all public land in states covered by the 1877 Act, not merely "desert" land. The court reasoned that the first proviso was sufficient to protect those claiming rights to desert land, and that, by adding the second proviso, which reserved all water over and

above such desert land appropriations, Congress apparently intended to protect the public's right to water on all public lands in all desert states, including Oregon. *Id.* at 386-87. The Oregon court's construction of the Desert Land Act of 1877 ultimately was upheld in *Power Co. v. Cement Co.*, 295 US 142, 55 S Ct 725, 79 L Ed 1356 (1935), in which the United States Supreme Court held that, in enacting that second proviso, Congress effectively severed title to all public land--not merely "desert" land--from title to the nonnavigable waters on that land:

> "By its terms, not only all surplus water over and above such use as might be appropriated and used by the desert-land entrymen, but 'the waters of all lakes, rivers, and other sources of water supply upon the public lands and not navigable' were to remain 'free for the appropriation and use of the public for irrigation, mining and manufacturing purposes.' If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, *it follows that*

> *a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed.*
>
> "* * * * *
>
> "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. The fair construction of the provision now under review is that *Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.*"

Id. at 158-62 (emphasis added; citations omitted). Thus, for claims granted after 1877, the property granted by the federal government under the Mining Act of 1872 consists of the unpatented mining claim itself. No water rights are granted as part of the claim. Water rights must be obtained as provided in the water rights laws of the state in which the site of the claim is located. *Id.*

As noted, nineteenth-century Oregon case law reflected a transition from the common law of riparian rights to the rule of prior appropriation. In 1909, however, the Oregon legislature enacted a comprehensive statute that significantly altered the nature of water rights in this state. Or Laws 1909, chs 216 & 221. The legislature began by declaring--in a provision that survives to this day--that "[a]ll water within the state from all sources of water supply belongs to the public." ORS 537.110. The legislature then expressly recognized prior appropriation as the exclusive means of acquiring water rights in this state and established a comprehensive permit system for appropriating water. *See generally* Hutchins, 36 Or L Rev at 204-05. The details of the permitting process have been altered many times since then. *See generally* Gail L. Achterman and Peter D. Mostow, *Senate Bill 674: Increasing the Flow Rate of Oregon's Water Rights Permitting Process*, 32 Willamette L Rev 187

(1996). But the process continues to be the exclusive mechanism for permitting use of and establishing property rights in the waters within the state. *See generally* ORS ch 537.

Meanwhile, in 1972, Congress enacted the federal Clean Water Act, which, among other things, prohibits the discharges of pollutants--including any industrial wastes--into the waters of the United States without first obtaining an NPDES permit. 33 USC §§ 1311(a), 1342(a) (1994). States are permitted to administer the NPDES permit program, 33 USC § 1342(b) (1994), and Oregon has elected to do so. ORS 468B.050 expressly provides that, subject to enumerated exceptions, no person may discharge any waste into the waters of the state without obtaining a permit from DEQ. Nothing in either the federal or state laws, however, confers a property right to obtain a permit or conduct any activities for which a permit is required.

In the light of the foregoing authorities, it becomes clear that plaintiff's contention that it has a right to discharge wastewater into the North Santiam River Subbasin is untenable. Plaintiff's unpatented mining claims came into existence in 1976, nearly 100 years after the enactment of the Desert Lands Act of 1877, which severed water rights from the grant of an unpatented mining claim. As a result, when the unpatented mining claims came into existence, no water rights were conferred with them. If plaintiff has a private property right to discharge wastewater into the publicly owned waters of the state, the right must have come into existence separately after compliance with state law regarding the creation and recognition of state water rights. There is no evidence in the record--and plaintiff makes no contention that any such evidence exists--that plaintiff has obtained a water rights permit or certificate after complying with the requirements of the statutory permit process.

Plaintiff insists that the right to discharge into the North Santiam River Subbasin was created by common law and recognized by the Mining Act of 1866. Plaintiff, however, neglects to address the effect of the Desert Land Act of 1877, which--at least as to mining claims that were acquired after the enactment of that statute--severed water rights from the other rights conferred by the granting of the mining claims and required that water rights be obtained in accordance with applicable state water laws.

Plaintiff contends that, in any event, even under current state water law, it is entitled to use up to 5,000 gallons of ground water without a permit under ORS 537.545(1). That statute provides that, subject to exceptions not pertinent to this case:

> "[N]o registration, certificate of registration, application for a permit, permit, certificate of completion or ground water right certificate * * * is required for the use of ground water for:

"* * * * *

"(f) Any single industrial or commercial purpose in an amount not exceeding 5,000 gallons a day[.]"

Plaintiff's contention is easily answered. By its terms, the statute permits the *consumption* of ground water. Even assuming that it applies to a mining operation, the statute does not permit the *discharge* of anything into a river of the state.

In short, plaintiff's takings claim is predicated on the loss of a right that it never possessed, namely, the "right" to discharge mining wastes into the waters of the state. It necessarily follows that, in denying plaintiff's application for a permit to conduct that activity, the state has not effected a taking of private property within the meaning of either the state or federal constitutions. We therefore hold that, in concluding that the denial of plaintiff's application for an NPDES permit did not effect an uncompensated taking of

property, the trial court was correct, albeit for a different reason from the one that the trial court adopted. In so holding, we express no opinion on the rationale that the trial court did adopt.

Affirmed.

FILED: October 13, 1999

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION,

Appellant,

v.

STATE OF OREGON,

Respondent.

(960906900; CA A98316)

Appeal from Circuit Court, Multnomah County.

Henry Kantor, Judge.

On appellant's petition for reconsideration filed June 2, 1999, and respondent's response to petition for reconsideration filed June 9, 1999. Opinion filed May 19, 1999. 160 Or App 513, 981 P2d 833.

Before Landau, Presiding Judge, and Deits, Chief Judge, and Wollheim, Judge.

LANDAU, P. J.

Petition for reconsideration allowed; opinion adhered to.

LANDAU, P. J.

Plaintiff Kinross Copper Corporation petitions for reconsideration of our opinion affirming the trial court's entry of summary judgment dismissing plaintiff's state and federal takings claims based on the denial of a permit to discharge mining wastewater into a river of the state. *Kinross Copper Corp. v. State of Oregon*, 160 Or App 513, 981 P2d 833 (1999). Plaintiff contends that, in our opinion, we erred in construing or applying the law. ORAP 6.25(1)(e). We allow the petition, but adhere to our opinion for the reasons that follow.

Plaintiff alleged that it suffered an uncompensated taking of property when the state denied it a permit to discharge groundwater and other wastewaters from its mining operation into the North Santiam River Subbasin. Plaintiff alleged that, without the ability to discharge into the river, its unpatented mining claim had no value. The trial court

entered summary judgment in favor of the state. On appeal, plaintiff argued that the trial court erred because it was undisputed that the denial of the permit deprived its claim of any use or value. The state argued that the trial court was correct because, among other things, there can be no taking of a right that plaintiff never possessed, and, plaintiff never possessed the right to discharge wastewater into a river of the state. Plaintiff replied that, indeed, it did have a right to discharge wastewater into a river of the state because, under ORS 537.545(1), plaintiff has the right to discharge up to 5,000 gallons of groundwater per day.

We agreed with the state. We held that ORS 537.545(1) did not have the effect of granting a property right to discharge wastewater:

> "By its terms, the statute permits the *consumption* of ground water. Even assuming that it applies to a mining operation, the statute does not permit the *discharge* of anything into a river of the state."

Kinross Copper Corp., 160 Or App at 525 (emphasis in original). We then concluded that, having lost no property right, plaintiff suffered no taking. *Id.* at 525-26.

On reconsideration, plaintiff contends that we correctly determined that ORS 537.545(1) does not grant a right to discharge wastewater. Nevertheless, they contend that they have that right at common law. According to plaintiff, all property owners have a common-law right of drainage. In fact, it argues that it does not even need to obtain a permit to exercise that right. Thus, plaintiff concludes, although we correctly determined that there can be no taking of a property right never held, in this case, it does possess such a right.

At the outset, we note that plaintiff did not make that argument in its briefs and previously cited none of the authorities on which it now relies. Plaintiff argued that it obtained the right to discharge its wastewater by virtue of its

water rights. We explained why that was incorrect as a matter of law. Now plaintiff argues that it obtained the right to discharge its wastewater at common law, independent of its water rights. If a contention was not raised in the brief, however, it is not appropriate to assert it on reconsideration. *Bergman v. Holden*, 122 Or App 257, 260, 857 P2d 217, *rev den* 318 Or 170 (1993) ("Ordinarily, a contention not raised in the original brief will not be considered on reconsideration.").

In any event, plaintiff has failed to demonstrate that its new argument is correct. According to plaintiff, the owner of an unpatented mining claim has a right to discharge wastewater into a river of the state without first obtaining a permit from the state to do so. Plaintiff bases that assertion on two opinions: *Harbison v. City of Hillsboro*, 103 Or 257, 204 P 613 (1922), and *Garbarino v. Van Cleave*, 214 Or 554, 330 P2d 28 (1958). Neither opinion stands for the

proposition for which it is cited. Both concern the rights of landowners to allow natural drainage flow onto the property of another and the extent to which that natural drainage can be artificially channeled. Neither speaks to the rights of property owners generally, much less to the rights of owners of unpatented mining claims particularly, to discharge wastewater into the waters of the state.

Plaintiff's argument is particularly difficult to understand given its logical implications. If plaintiff has a common-law right to discharge wastewater into the rivers of the state without a permit, then it never needed to apply for a permit to conduct its mining operation. Plaintiff does not explain--and we do not understand--how it can be a taking of property to deny a permit that plaintiff did not need in the first place.

Petition for reconsideration allowed; opinion adhered to.

IN THE SUPREME COURT OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION,	)	ORDER DENYING REVIEW
Appellant/Petitioner	)	
	)	CA A98316
v.	)	SC S46982
STATE OF OREGON,	)	
Respondent/Respondent.	)	

The Court has considered the petition for review and orders that it be denied.

DATE: February 29, 2000.

/S/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

KULONGOSKI, J. NOT PARTICIPATING
GILLETTE AND VAN HOOMISSEN, JJ.
WOULD ALLOW

IN THE SUPREME COURT OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION,	)	Multnomah County Circuit Court No. 960906900
Plaintiff-Appellant, Petitioner on Review,	)	SC S46982 CA A98316
v.	)	
STATE OF OREGON	)	ORDER DENYING RECONSIDERATION
Defendant-Respondent, Respondent on Review.	)	

Upon consideration by the court.

The Court has considered the petition for reconsideration and orders that it be denied.

Dated this 20th day of June 2000.

/S/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

Kulongoski, J., not participating

DISTRICT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

June 9, 1997

Re: Kinross Copper v. State of Oregon
Case No. 960906900

Dear Counsel:

Since the hearing in April, I have reread all of your materials (including those submitted after the hearing), conducted my own research and cogitated over the more difficult legal and factual issues presented by your cross-motions for summary judgment. I have drafted and rejected relatively lengthy findings of fact and conclusions of law. I now have decided to give you the rulings you need and to share my reasoning on a few key issues.

Plaintiffs motion for partial summary judgment is denied. Defendant's motion for summary judgment is granted.

As a preliminary, I have concluded that, for purposes of these motions, the law governing both the federal and state takings claims is the same on all essential issues. *See* Lucas v. South Carolina Coastal Council, 505 US 1003, 1116 (1992), *and* Boise Cascade Corp. v. Board of Forestry, 325 Or 185, 197-99 (1997).

The issue, or rather concept, I have struggled with most is whether plaintiff's unpatented mining claim is the type of interest which is subject to constitutional takings analysis. In general, unpatented mining claims are protected property interests. United States v. Locke, 471 US 84, 86 (1985). At the same time, an unpatented mining claim is nowhere close to a fee simple, as it appears to have a variety of conditions precedent and subsequent attached. Until recently, I have been unable to articulate what it is about plaintiff's unpatented mining claim which makes it, in my

view, a property interest which is *not* subject to constitutional takings protection.

With the assistance of a borrowed law clerk, I came across Graf, "Application of Takings Law to the Regulation of Unpatented Mining Claims," 24 Ecology L Q 57 (1997) ("Graf"). The author of this law review article put into words what I already had been thinking.

In my judgment, plaintiff's unpatented mining claim is conditioned upon compliance with authorized and applicable federal and state regulations. This is true for regulations which exist prior to the initial discovery as well as for some regulations which come into existence after discovery but before any mining is done. I qualify the second group of regulations because I believe that only regulations which are within the reasonable expectations of a reasonable owner of a mining claim (an objective test) necessarily attach

to the claim and become part of the property interest. Lucas at 1027.

It has been agreed between the parties that one of the elements of an unpatented mining claim is a "valuable discovery." I conclude that whether a discovery is valuable depends on the cost of complying with applicable regulations (as discussed above). In this case, the state's clean water regulations make plaintiff's predecessors' discovery far from valuable, "thereby extinguishing the 'property interest' necessary to bring a Fifth Amendment action." Graf at 113.

I could discuss the authorities you each presented as well as the authorities discussed in Graf. Instead, I refer you to primarily to the discussion at Graf at 112-28.

If my analysis of plaintiff's unpatented mining claim is in error, I would deny both parties' motions, although I might have made a few rulings which could have guided the trial judge. I recognize that this is inconsistent with my letter

ruling of December 24, 1996. However, I became convinced after rereading Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F3d 1422, 1428-34 (9th Cir 1996), that several jury questions would be presented.

Ms. Fjordbeck shall submit an order and a judgment after compliance with the applicable uniform and local rules.

Very truly yours,

/s/ Henry Kantor
Henry Kantor
District Court Judge

CIRCUIT COURT OF OREGON
MULTNOMAH COUNTY

KINROSS COPPER CORPORATION,	)	
Plaintiff,	)	No. 9609-06900
v.	)	ORDER
STATE OF OREGON, Defendant.	)	

This matter came before the court on Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment. The court has considered the motions, memoranda, and supporting documents, as well as the arguments of counsel for the parties and the amicus, North Santiam Watershed Council.

It is hereby ordered as follows:

1. Defendant's Motion for Summary Judgment is granted.

2. Plaintiff's Motion for Partial Summary Judgment is denied.

3. This matter is dismissed.

Dated this 25th day of June, 1997.

/S/ Henry Kantor
Henry Kantor
Circuit Judge *pro tem*

CIRCUIT COURT OF OREGON
MULTNOMAH COUNTY

KINROSS COPPER CORPORATION, Plaintiff,	)	No. 9609-06900
v.	)	JUDGMENT
STATE OF OREGON Defendant.	)	

This court has granted Defendant's Motion for Summary Judgment. It is therefore ordered, adjudged, and decreed as follows:

Judgment is entered in favor of the Defendant, the State of Oregon, and against the Plaintiff, Kinross Copper Corporation.

Defendant may file its cost bill in accordance with ORCP 68.

Dated this 25th day of June, 1997.

/S/ Henry Kantor
Henry Kantor
Circuit Judge *pro tem*

IN THE SUPREME COURT OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION,	)	Supreme Court No. 546982
Plaintiff-Appellant, Petitioner on Review,	)	Court of Appeals No. A98316
v.	)	(Multnomah County Circuit Court)
STATE OF OREGON,	)	TC No. 9609-06900
Defendant-Respondent/ Respondent on Review.	)	

PETITIONER ON REVIEW KINROSS COPPER CORPORATION'S PETITION FOR REVIEW

Petition for Review of the Opinion of the
Court of Appeals Affirming the Judgment
Entered in Multnomah County Circuit Court
on June 25, 1997 by the Honorable Henry Kantor

Opinion Filed: May 19, 1999
Reconsideration Allowed and
Opinion Adhered to: October 13, 1999
Author of Opinions: Landau, J.
Joined by: Deits, P.J., Wollheim, J.

A. PRAYER FOR REVIEW

Petitioner Kinross Copper Corporation ("Petitioner" or "Kinross") seeks review by this Court of the Opinion of the Oregon Court of Appeals dated May 19, 1999 and the Opinion on Reconsideration dated October 13, 1999. (Opinions are appended to this petition.)

B. LEGAL QUESTIONS PRESENTED

1. Did the court of appeals err in holding that Petitioner has no proprietary interest that was taken under either the Oregon or U.S. constitutions by a state regulation that prohibits Petitioner from discharging mining water into a neighboring stream to Petitioner's unpatented mining claim where the undisputed effect of the regulation is to prevent Petitioner from mining the claim and where mining undisputedly is the only

economically viable use of the unpatented mining claim?

2. a. Did the court of appeals err in holding that Petitioner has no right at common law to discharge or drain water from its unpatented mining claim into a neighboring stream where the discharge or drainage would not be deemed a common law nuisance?

   b. If Petitioner does have that common law drainage or discharge right, and loss of the right takes away all economically beneficial use of the mining claim, does the state effect a taking when by regulation it prevents Petitioner from exercising that right?

3. If enforcement of the state regulation in this case does not effect a permanent taking under the Oregon or U.S. constitutions, is the state regulation preempted by federal law and, if so, does Petitioner have a right to compensation for a temporary taking?

C. PROPOSED RULES OF LAW

1. When state regulation of water discharge has the effect of preventing a holder of an unpatented mining claim from mining the claim, that regulation causes a taking of the holder's property interest in the claim under both the Oregon and U.S. constitutions. This is true whether or not the claim holder has a separate property interest in discharging water into a neighboring stream.

2. a. A holder of an unpatented mining claim has a common law right to discharge mining water into a neighboring stream provided such discharge does not constitute a nuisance.

   b. A state regulation that bars all such discharges, so as to deprive the claim holder of all beneficial use of the claim, is a taking for which the claim holder must be compensated.

3. If no taking occurred under either the Oregon or U.S. constitutions, the state regulation as applied in this case is preempted by federal mining and land use law and Petitioner may recover for a temporary taking during the period in which the state regulation was wrongfully imposed.

D. REASONS FOR REVERSAL

An unpatented mining claim may only be used for mining. Consequently, a regulation that has the effect of making mining impossible and that is enacted after a proprietary interest in an unpatented mining claim has been established effects a taking of that proprietary interest. *See Skaw v. United States,* 740 F2d 932 (Fed Cir 1984), *cert den* 488 US 854 (1988). *Skaw* should be dispositive in this case. However, the court of appeals attempted to dodge *Skaw*[1] and the meat of the state and federal takings questions in this case by applying a legal theory not argued by the state:[2] that Kinross does not have a proprietary right or interest to

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[1] In fact, despite numerous citations to and discussion of *Skaw in* Kinross' appellate brief, the court of appeals never even mentioned *Skaw* in either of its opinions.

[2] The closest the state came to asserting this legal theory was to note in a footnote in its Respondent's Brief (page 21) in the court of appeals that Kinross had not established a right to use water at all (as opposed to discharge or drain water). The state conceded that it had failed to raise even that legal theory in the trial court.

discharge mining water into a stream of the North Santiam River subbasin and, consequently, that Kinross could not have had its property interest in an unpatented mining claim taken by a state regulation prohibiting such discharge. Kinross respectfully submits that the question whether Kinross has a proprietary right to discharge water into the North Santiam River subbasin misses the point. It is undisputed in this case that the *effect* of the regulation was to prevent Kinross from mining its leased unpatented mining claim. It also is undisputed in this case that mining the unpatented mining claim is its only economically viable use. Under well-established federal and state takings analysis, that is all that is necessary to establish a compensable taking.

The court of appeals opinion creates a new takings criterion never before applied in either Oregon or any other state or federal jurisdiction. Namely, the court of appeals suggests that if a state (or local) law or regulation is drafted

in such a way that it does not expressly prohibit a landowner or lessee's use of property, and instead the law or regulation merely has the *effect* of making such use impossible, then no constitutional taking can occur. Such a conclusion welcomes state and local jurisdictions to draft creative laws that only have the effect of eliminating all economically beneficial use of property without expressly doing so. The court of appeals cited to no existing case law to support its novel legal theory. Nor does any exist. It is contrary to established takings principles; the issue is one of causation. *Armstrong v. United States*, 364 US 40, 46-48, 80 S Ct 1563, 4 L Ed 2d 1554 (1960) ("The total destruction by the Government of all value of [the property interest] has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure. Before the [property interest was] destroyed, the [plaintiffs] admittedly had compensable property. Immediately afterwards, they had

none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the [property] * * *."). Both this Court and other courts have found takings under either state or federal constitutions under circumstances analogous to this case.

In *Boise Cascade Corporation v. Board of Forestry (S42159)*, 325 Or 185, 197, 935 P2d 411 (1997), this Court held that, under the state takings clause, a taking is established when a property owner shows that "the application of the government's particular choice deprives the owner of all economically viable use of the property." That test did not exclude from takings those governmental regulations (choices) that *indirectly* prohibit all economic use of a landowner's property. To the contrary, the governmental regulation at issue in *Boise Cascade* protected spotted owl and its habitat, in part, from "`disturbances resulting from

[logging] operation[s].'" *Id.* at 188 n 5 (citation omitted). The regulation did not directly prohibit logging in that context, it merely prohibited activities that would disturb the spotted owl. Nonetheless, because logging cannot be done without eliminating its habitat, including the prey necessary for its survival, the effect of the regulation was to prevent the timber company from being able to log its property. This Court had no difficulty in concluding that the timber company stated a claim for relief under Article I, section 18, of the Oregon Constitution. *See also Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F2d 1200 (4th Cir 1986) (holding under South Carolina constitution that municipality's discharge of noxious odors that created awful smell on landowner's property constituted taking and not inquiring into whether landowner had proprietary interest in air).

Similarly, the Federal Circuit has held that a denial of a permit to fill wetlands can effect a taking of a landowner's property under the Fifth Amendment. *Florida Rock Industries, Inc. v. U.S.*, 18 F3d 1560 (Fed Cir 1994); *see also Palm Beach Isles Associates v. U.S.*, 42 Fed Cl 340 (1998) (applying federal takings analysis to denial of dredge and fill permit); *Plantation Landing Resort, Inc. v. U.S.*, 30 Fed Cl 63 (1993) (same; concluding that no taking occurred because denial of permit did not deny all economically beneficial use of property). The *Florida Rock* court did not inquire into whether the property owner had a proprietary interest in the wetlands, which are classified as waters of the United States. In *Holden v. U.S.*, 38 Fed Cl 732 (1997), the court indicated that the closure of a road that has the effect of preventing access to an unpatented mining claim can constitute a taking of the property right in the mining claim even though the miner has no property interest in the road

itself. There simply is no requirement under either state of federal takings analysis that a state or local regulation must expressly prohibit one's use of a proprietary interest in order to effect a taking. Where the effect of the regulation is to make impossible any economic use of a property interest, a taking can result, and a taking did result in this case.

Assuming arguendo that the court of appeals correctly looked to whether Kinross had a proprietary right to discharge mining water into a river or stream of the state, the court of appeals reached the wrong conclusion. As Kinross argued first in its Opening Brief (page 19)[3] and later in its Petition for Reconsideration, a property owner has a common law right to discharge or drain water (including mine

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[3] The court of appeals is either too demanding or simply mistaken to say that Kinross failed to argue the point in its Opening Brief. (Opinion on Reconsideration at 2.) In any event, since the court of appeals decided the case on a legal theory not raised by the parties, Kinross should be allowed to respond to the legal theory on reconsideration and before this Court.

water) from his or her property into a watercourse, so long as such action does not constitute a nuisance to other property owners. *See Provolt v. Bailey,* 62 Or 58, 121 P 961 (1912) (mining discharge); *Carson v. Hayes,* 39 Or 97, 65 P 814 (1901) (same); *Harbison, et Ux. v. City of Hillsboro,* 103 Or 257, 204 P 613 (1922) (stormwater discharge); *Garbarino v. Van Cleave et al,* 214 Or 554, 330 P2d 28 (1958) (same); *see also Atuhinson v. Peterson,* 87 US (20 Wall) 507, 22 L Ed 414 (1874) (mining discharge); *see generally* Lindley on Mines § 841 (3d ed 1914).[4] It is undisputed that the proposed

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[4] Of course, this common law right can be limited by enactments of state and federal water quality standards *(i.e.,* regulations that may limit but do not prohibit uses of land) enacted *before* to a person's acquisition of a property right. In this case, the Clean Water Act and its clean water standards predated Kinross' property interest in the unpatented mining claim. Consequently, Kinross' common law right to discharge mining water into a stream is limited by the requirement to meet those water quality standards. The court of appeals erroneously interpreted Kinross' position in its Petition for Reconsideration to be that its common law right to discharge mining water somehow negated the need to secure an National Pollutant Discharge Elimination System permit. (Court of Appeals Opinion on Reconsideration at 3.) Kinross does not assert such a

discharge of water from Kinross' property would meet all state and federal water quality standards, and it is clear that the discharge would not constitute a nuisance at common law. In fact, it is undisputed that the mining discharge would have been undetectable 2,000 feet downriver of the discharge point. Consequently, the court of appeals erred in concluding that Kinross did not have a protected proprietary interest to discharge water from its unpatented mining claim into a stream. Because the court of appeals erred in concluding that Kinross did not have a proprietary interest in the discharge of mining water, it never carried out the necessary takings analysis under state and federal law.[5] Kinross relies on its

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claim.

[5] Under federal takings analysis, state nuisance law is the parameter by which a state regulation is to be evaluated. Where the state regulation is within the bounds of what could have been deemed a common law nuisance, then no taking can be established. But where the state regulation goes beyond the scope of common law nuisance, a taking may be found, provided the other takings criteria are met. *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798

briefing in the court of appeals to support its claim that enforcement of the state regulation resulted in a taking of Kinross' proprietary interest in the unpatented mining claim.[6] If review is allowed, Kinross will elaborate on this analysis.

Finally, even assuming arguendo that the court of appeals correctly concluded that the state regulation as applied in this case did not effect a taking because Kinross does not have a proprietary interest in discharging mining water into a neighboring stream, the state regulation would be preempted under federal law. The case law is clear that state

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(1992); *Loveladies Harbor, Inc. v. U.S.*, 28 F3d 1171, 1182 (Fed Cir 1994) (question is whether state's "regulatory imposition goes beyond the [state's] powers under common law nuisance doctrine * * *."); *Creppel v. U.S.*, 41 F2d 627, 631 (Fed Cir 1994) ("If state nuisance law does not justify the restraint, the court must proceed to the remaining [takings] criteria.").

[6] As was mentioned above, an unpatented mining claim may only be used for mining. Consequently, a regulation that has the effect of making mining impossible and that is enacted after a proprietary interest in an unpatented mining claim has been established effects a taking of that proprietary interest. *See Skaw v. United States*, 740 F2d 932 (Fed Cir 1984), *cert den* 488 US 854 (1988).

and local laws and regulations that prevent mining on federal lands are preempted by federal mining and land use laws. *See Elliott v. Oregon International Mining Co.*, 60 Or App 474, 654 P2d 663 (1982) (holding that county land use ordinance prohibiting surface mining on certain federal mining claims was preempted by Stock Raising Homestead Act). More recently, the Eighth Circuit held that a county ordinance that prohibited the issuance of any new or amended permits for surface metal mining within a certain area was preempted by the Federal Mining Act. *South Dakota Mining Assn, Inc. v. Lawrence County,* 155 F3d 1005 (8th Cir 1998).

During the time in which the state has applied the Three Basin Rule in such a way as to prevent mining on Kinross' unpatented mining claim, there would have been a temporary taking under the principles discussed by this Court in *Boise Cascade.*

E. FACTS RELEVANT TO REVIEW

The following facts are derived from the Stipulated Statement of Facts that the parties agreed to as part of their cross-motions for summary judgment and from additional facts that were stated in Kinross' Opening Brief in the court of appeals and were undisputed.

In 1989, Kinross (under its former name, Plexus, Inc.) acquired by lease the right to mine an unpatented mining claim in the Cedar Creek Valley of the North Santiam River subbasin in the Willamette National Forest. The unpatented mining claim was staked in 1975 by Cyprus Metals Exploration Corporation ("Cyprus") (formerly Amoco Minerals Co.), and Cyprus subsequently made a discovery of high-grade copper ore on the claims in 1976. Cyprus as the lessor of the subject claims retained the right to receive a royalty based upon the production from the mine.

In 1977, the Environmental Quality Commission (the "EQC") adopted OAR 340-041-470(1), which is commonly referred to as the Three Basin Rule. It prohibited wastewater discharges in the McKenzie, Clackamas, and North Santiam River subbasins. After promulgation of the Three Basin Rule and until the rule was amended in 1995, the Department of Environmental Quality ("DEQ") developed an administrative interpretation of the rule that allowed nonmajor discharges and issued at least 75 National Pollutant Discharge Elimination System ("NPDES") permits for what were deemed to be nonmajor discharges within the three rivers' subbasins. In 1991, Kinross received an NPDES permit for a discharge associated with its initial mine construction activities.

In 1992, Kinross applied for an NPDES permit to carry out its mining activities. DEQ worked with Kinross for more than a year with the intent of issuing the permit, until a

DEQ staff member questioned whether the Three Basin Rule did not prohibit issuance of the NPDES permit. DEQ sought advice from the Attorney General's office and was instructed that the Three Basin Rule prohibited all discharges, even those deemed to be nonmajor.[7] In a memorandum dated December 10, 1993, DEQ advised the EQC that an NPDES permit for Kinross' mining project could be issued under conditions where "there would be no measurable impact on the North Santiam River or the Little North Santiam River" but, nonetheless, DEQ concluded that it was prohibited from issuing the permit by the Three Basin Rule because the rule "prohibits development requiring a discharge permit, regardless of the impact on water quality." DEQ noted that "[a] few thousand feet downstream of the mixing zone, the

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[7] The state's counsel before the trial court acknowledged that the Three Basin Rule would prevent even the discharge of distilled water. (Transcript on Hearing on Summary Judgment Motions at 57 (Apr. 19, 1997).)

Kinross discharge would not be measurable" and that "the discharge load would not cause water quality standards to be violated." DEQ also noted that "[a] non-discharge alternative such as spray irrigation is not viable because of the steep terrain" and that "[d]ue to heavy precipitation in the area and the potential for encountering high volumes of groundwater during the mining operation, Kinross would not be able to develop and operate the mine without an NPDES waste discharge permit."

On March 21, 1995, DEQ denied Kinross' application for an NPDES permit. On April 7, 1995, Kinross requested a contested case hearing on the denial. The EQC issued a final order denying the application on August 30, 1996.

Kinross filed an inverse condemnation action in Multnomah County Circuit Court and the court granted the state's motion for summary judgement on June 26, 1997. The trial judge relied primarily on a law review article by

Michael Graf, titled "Application of Takings Law to the Regulation of Unpatented Mining Claims." That article argued, contrary to established law, that unpatented mining claims should be deemed a lesser property interest than is fee title and consequently that unpatented mining claims should not be compensated for a taking when after-enacted laws or regulations take away the opportunity to mine the claim.

Kinross appealed to the court of appeals on July 3, 1997. The court of appeals issued an opinion May 19, 1999 upholding the circuit court decision on different grounds. The court of appeals concluded that Kinross did not have a proprietary interest in discharging water that could have been taken by application of the Three Basin Rule and the resulting denial of Kinross' NPDES application. That legal theory had not been argued by the state or amicus below.

On June 2, 1999, Kinross petitioned for reconsideration in the court of appeals. Kinross asserted that

it does have a common law right to discharge water from its unpatented mining claim provided that such discharge does not constitute a nuisance. On October 13, 1999, the court of appeals allowed reconsideration and adhered to its prior opinion. In doing so, the court of appeals rejected Kinross' assertion and concluded that no such common law right exists.

F. IMPORTANCE OF REVIEW

This case presents an important issue concerning the takings clauses of both the Oregon (Article 1, section 18) and U.S. (Fifth Amendment through application of Fourteenth Amendment) constitutions. It also appears to conflict with prior decisions by this Court and by federal courts. See discussion above concerning *Boise Cascade*, 325 Or at 197, *Florida Rock*, 18 F3d 1560 and related cases.

The issue presented by this case will have widespread significance and will arise repeatedly in different contexts. The court of appeals opinion logically supports the proposition that a state or local regulation that does not directly prohibit any specific use of property cannot effect a taking under either state or federal law, even when the effect of the regulation is to prohibit a landowner from exercising any economically viable use of its property. For instance, under the court of appeals analysis, and contrary to existing case law, a state regulation prohibiting the fill of wetlands or the discharge of material into waters of the state under any and all circumstances could never effect a taking on the theory that a landowner does not have a proprietary interest in the waters of the state or of the United States. Similarly, a state regulation prohibiting all discharges into the air within a specific geographical area, even if such discharge meets all federal, state and local air quality standards, apparently could

not constitute a taking under any circumstance, because a landowner does not have a proprietary interest in the air or in discharging matter into the air.

The court of appeals decision if unaltered by this Court will also modify the common law. Henceforth, the long-established right of miner at common law to nonnuisance discharge or drainage of water into a stream will be subject to elimination not by legislative act but by administrative reinterpretation of an administrative rule. The court of appeals' justification of the regulation on the basis that a miner never had the right to discharge nonpolluting mine waters, in itself, constitutes a taking and a violation of due process. *See Hughes v. State of Washington,* 389 US 290, 296-97, 88 S Ct 438, 19 L Ed 2d 530 (1967) (Justice Stewart concurring, in which he stated, "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple

device of asserting retroactively that the property it has taken never existed at all."); *see also Stevens v. City of Cannon Beach*, 510 US 1207, 114 S Ct 1332, 1334, 127 L Ed 2d 679 (1994) (Justices Scalia and O'Connor dissenting from the court's denial to grant certiorari in 317 Or 131, 854 P2d 449 (1993)); Barton H. Thompson, Jr., "Judicial Takings," 76 Va L Rev 1449 (1990); David J. Bederman, "The Curious Resurrection of Custom: Beach Access and Judicial Takings, 96 Column L Rev 1375, 1438-42 (1996). Such a result should not stand.

Also supporting review in this case is that amicus curiae supporting both Kinross and the state have appeared below and are available to advise the court.

Finally, the issues at hand are properly presented in this case, and there are no factual disputes or procedural obstacles that might impede this Court's review. It is undisputed that the Three Basin Rule, as applied in this case,

barred Kinross from a discharge of water that otherwise would have met all state and federal water quality standards. In fact, it is undisputed that the proposed discharge in this case would not have been detectable more than a few thousand feet beyond the mixing zone. It also is undisputed that the effect of prohibiting such discharge prevented Kinross from mining its leased unpatented mining claim, which was the only economically viable use of the property interest. The issue presented to this Court is a legal one. There is no reason to defer review to allow for further exploration of the issue or development of additional facts in the trial court or the court of appeals. The question is concise and is here as fully framed as it could be in any adjudication.

G. CONCLUSION

This petition for review should be granted.

Dated this 17th day of November, 1999.

Respectfully submitted,

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Attorneys for Petitioner on Review
Kinross Copper Corporation

IN THE SUPREME COURT OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION, Plaintiff-Appellant, Petitioner on Review,	)	Supreme Court No. S46982 Court of Appeals No. A98316
v.	)	(Multnomah County Circuit Court)
STATE OFOREGON Defendant-Respondent Respondent on Review.	)	TC No. 960906900

KINROSS COPPER CORPORATION'S
PETITION FOR RECONSIDERATION

Petition for Review of the Order of the
Supreme Court Denying Review of the
Decision of the Court of Appeals

Date of Order: February 29, 2000

This case has national significance. The highest court in Oregon should have the opportunity to be heard on the issues raised here. They will come before this Court and others again (and again) in the future. The issues arise here in the plainest and most timely context possible, allowing a clean and efficient analysis of fundamentally important questions. This Court has narrowly missed (by a single vote) the opportunity it should now reconsider and grasp. These are the issues:

1. Can an unpatented mining property right granted by federal law be abrogated by a state regulation that prevents the mine from discharging nonpolluting mine water, which meets state and federal drinking water standards, without requiring the state to pay just compensation for a "taking" under the Fifth Amendment's Taking Clause?

This question involves two subissues. The first is whether, because an unpatented mining claim has no

economic value unless it can be mined, petitioner is entitled to just compensation for its loss under Lucas v. South Carolina Coastal Council, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992). The court of appeals decision in this case is in direct conflict with Skaw v. United States, 740 F2d 932 (Fed Cir 1984) (taking of unpatented mining claim), cert den 488 US 854 (1988), and Florida Rock Industries. Inc. v. United States, 791 F2d 893, 896, 904 (Fed Cir 1986) (taking of mining interest because federal government would not issue Clean Water Act permit when only harm to water quality was "short term" turbidity).

The second subissue is whether the subject regulation is preempted by federal law and, therefore, invalid under California Coastal Com'n v. Granite Rock Co., 480 US 572, 586-87, 107 S Ct 1419, 94 L Ed 2d 577 (1987) (state law cannot prohibit operation of mining claim on federal lands). If the subject regulation is preempted, petitioner is entitled to

just compensation for a temporary taking for the period it has been prohibited from mining its claim. First English Evan. Luth. Ch. v. Los Angeles Cty., 482 US 304, 107 S Ct 2378, 96 L Ed 2d 250 (1987).

2. Does takings jurisprudence require a property owner to show that it has a property interest in the very thing the state seeks to regulate, rather than merely showing that the effect of the regulation as applied to petitioner denies it all economic use of a federally recognized property right?

As pointed out in petitioner's petition for review, the issue is one of causation. Armstrong v. United States, 364 US 40, 46-48, 80 S Ct 1563, 4 L Ed 2d 1554 (1960). It is "the effect of the denial" that gives rise to a taking. United States v. Riverside Bayview Homes, Inc., 474 US 121, 127, 106 S Ct 455, 88 L Ed 2d 419 (1985); see also Jan G. Laitos, Law of Property Rights Protection: Limitations on Governmental Powers § 10.07[A][2] at 10-48 (Supp

2000) ("The plaintiff can establish adequate linkage between the government--defendant's actions and harm incurred if the government defendant authorized the act that brought about the taking, and the taking was the natural consequence, or cause, of the government-approved acts."). Or as Professor Laitos also states, courts use a "but for" test. Id. § 10.07[A] at 10-44. In this case, but for the state's refusal to grant an NPDES permit, petitioner would not have been denied all economic use of its mining claim.

3. Does the statement in Lucas that "'the proscribed use interests were not part of [plaintiff's] title to begin with[]' 505 US at 1027" allow the court of appeals to redefine the common law of this state to hold that a property owner never had the right to discharge nonpolluting mine water into a stream? Kinross Copper Corp. v. State of Oregon, 160 Or App 513, 519, 981 P2d 833 (1999).

There is no doubt that under the common law of this state a miner has always had the right to discharge nonpolluting mine waters into a stream. Provolt v. Bailey, 62 Or 58, 121 P 961 (1912); Carson v. Haves, 39 Or 97, 65 P 814 (1901). That right is a part of the bundle of property rights on federal lands that predate statehood. Atchison v. Peterson, 87 US (20 Wall) 507, 22 L Ed 414 (1874). This Court needs to make clear that the test of whether a property interest is a part of a landowner's "bundle of rights" to begin with is determined by whether the property owner's proposed activity could have been enjoined at common law as either a private or public nuisance. Lucas, 505 US at 1029-30. The test is not, as the court of appeals held, whether in order to discharge nonpolluting mine water the petitioner must first show a right to appropriate the water for a beneficial use. 160 Or App 522-25. The right to discharge and the right to appropriate water are governed by different sets of rules.

The state is now regularly taking the position in takings cases that based on Lucas "the proscribed use interests were not part of [plaintiff's] title to begin with," no matter how frivolous its position may be, when it is clear that the conduct that has been proscribed could not have been enjoined at common law as a nuisance. See Boise Cascade Core. v. Board of Forestry, 164 Or App 114, 127, 991 P2d 563 (1999) (as the court stated: "The state offers no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance."). Boise Cascade is presently still before the court of appeals on the state's motion for rehearing; that case will shortly be before this Court on a petition for review, since the court of appeals has already denied a motion for rehearing from the plaintiff.

The retroactive holding of the court of appeals that plaintiff never had the right to discharge nonpolluting mine

water into a stream, to avoid finding a taking, is in itself a judicial taking that this Court should not let stand. Hughes v. State of Washington, 389 US 290, 296-97, 88 S Ct 438, 19 L Ed 2d 530 (1967) (Stewart, J, concurring). This Court needs to make clear to the lower courts of this state that property rights cannot be taken away without the payment of just compensation by merely reinterpreting the common law of property to avoid a taking. See Stevens v. City of Cannon Beach, 510 US 1207, 114 S Ct 1332, 1334, 127 L Ed 2d 679 (1994) (Scalia and O'Connor, JJ, dissenting). The issue of judicial takings by means of reinterpreting, or in this case ignoring, common law precedents is an important one that has seldom been addressed by the courts. See Robinson v. Ariyoshi, 753 F2d 1468, 1474 (9th Cir 1985) (Goodwin, J), (change in rules governing state's water law cannot divest real property rights that were vested before state supreme court announced new law without constituting taking

requiring payment of compensation), cert granted, rev'd on other grounds 477 US 902 (1986); see also Laitos, supra, § 8.02[E];[1] Barton H. Thompson, Jr., "Judicial Takings," 76 Va

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[1] Professor Laitos gives the following example of a judicial taking that closely parallels the reasoning of the court of appeals in this case:

> "For example, assume that a property owner discovers that his land has been inundated by water released by a neighbor whose land is uphill from the owner's land. The downhill owner brings a common law trespass action against the uphill neighbor. A court rules, as a matter of common law, that the downhill owner never had property in the now-flooded land because that land was a wetland. The court further rules that if wetlands exist on private land, they are public property due to their ecological and environmental importance, and are not part of the title of the private owner's land. Since the downhill owner does not, as a result of this court decision, have common law private 'property' in his flooded land, he cannot bring a trespass action against the uphill neighbor. The downhill owner can then allege that the court ruling has worked judicial taking of his land, as it has made his private property become public property without compensation." Jan G. Laitos, Law of Property Rights Protection: Limitations on Governmental Powers § 802[E] at 8-23 to 8-24 (Supp 2000) (emphasis added).

L Rev 1449 (1990); David J. Bederman, "The Curious Resurrection of Custom: Beach Access and Judicial Takings," 96 Colum L Rev 1375, 1438-42 (1996).

Dated this 14th day of March, 2000.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE
STATE OF OREGON FOR THE
COUNTY OF MULTNOMAH

KINROSS COPPER CORPORATION, a foreign corporation,	)	Case No. 9609-06900
Plaintiff,	)	STIPULATED STATEMENT OF FACTS
v.	)	
STATE OF OREGON,	)	
Defendant.	)	

Except as noted, the parties hereby stipulate to the accuracy and relevancy of the following facts:

1. Plaintiff is the lessee of mining claims located in the Cedar Creek Valley of the North Santiam River Subbasin in the Willamette National Forest, which it leased under its former name, Plexus, Inc. ("Plexus"), from Cyprus Metals Exploration Corporation ("Cyprus"). That lease occurred in 1989. Under its terms plaintiff is required to pay Cyprus an annual rental fee and once the mine went into

operation a production royalty based on the net value of the ore mined. It is anticipated that the mine would produce approximately 360,000 tons annually and have a productive life of eight years.

2. Cyprus was formerly known as Amoco Minerals Co. ("Amoco"), which in 1975 staked the subject claims. Amoco through the use of several methods for geological exploration discovered a high grade copper ore body on the claims in 1976.

3. Effective January 22, 1977, defendant, through its Environmental Quality Commission ("EQC"), adopted OAR 340-41-470(1), which is now known as the Three Basin Rule, that prohibited wastewater discharges in the McKenzie, Clackamas, and North Santiam River subbasins.

4. In 1991, Plexus submitted a Plan of Operations for what was called the "Bornite [a copper ore]

Project" to USFS for approval. On April 22, 1993, the Forest Supervisor of the Willamette National Forest adopted a ROD and FEIS. The ROD and FEIS recognized that to operate the mine, plaintiff would be required to obtain from defendant a National Pollutant Discharge Elimination System ("NPDES") permit. The obtaining of applicable state permits, including a NPDES permit, was made a condition by USFS's final approval of the Plan of Operations for the Bornite Project.

5. While the Bornite Project was undergoing review by USFS, on July 22, 1992, Plexus submitted to Department of Environmental Quality ("DEQ") applications for an NPDES permit and for a Water Pollution Control Facility ("WPCF") permit that would allow it to discharge groundwater pumped from the mine and other wastewater from the Bornite Project. Subsequently, the DEQ returned the application for an WPCF permit on the basis that all

discharges from the Bornite Project would be included in the NPDES permit.

6. (Defendant admits the accuracy, but disputes the relevancy of the following facts.) In a memorandum dated December 10, 1993, DEQ advised EQC that an NPDES permit for the Bornite Project could be issued under conditions where "there would be no measurable impact on the North Santiam River or the Little North Santiam River" but that it was prohibited from doing so because of the "Three Basin Rule" contained in OAR 340-41-470(1). In that same memorandum, DEQ also advised EQC that plaintiff required an NPDES permit to proceed with the mining project but that it could not do so under literal reading of the Three Basin Rule because

> "the rule language is broad and effectively prevents the issuance of permits for any new facilities (including new facilities requiring storm water permits) regardless of the impact of the discharge. The rule may effectively preclude development and other activities in

> these areas that were not intended to be affected by the rule."

EQC was further advised that the Three Basin Rule

> "prohibits development requiring a discharge permit, regardless of the impact on water quality. No exceptions are allowed. This rule, together with the requirements for storm water permits, may have the effect of precluding activities and land uses in these subbasins that were never intended to be precluded."

7. (Defendant admits the accuracy, but disputes the relevancy of the following facts.) On January 21, 1994, DEQ in a second memorandum to EQC made the following findings:

> "OAR 340-41-470(1) is more stringent than required by the Clean Water Act or federal rules because it prohibits any new or increased discharges into the Clackamas, North Santiam and McKenzie river sub basins. This is more than is required to meet water quality standards and protect beneficial uses and more than what is required by the federal anti-degradation rule, 40 CFR 131.12.
>
> "All of the rule amendment alternatives included in this staff report, while allowing various levels of relaxation of the

current rule, would still result in a rule, if adopted, that is more stringent than required by federal law or rules."

8. (Defendant admits the accuracy, but disputes the relevancy of the following facts.) Referring to the Bornite Project, DEQ specifically found:

A. "The Department conducted a mass balance analysis to determine whether the existing level of water quality will be 'maintained and protected' (Attachment C). The analysis indicates that the discharge, after mixing with the stream, would be well below the most stringent water quality standards, chronic toxicity. Therefore, water quality standards would not be violated and beneficial uses would be protected. However, there would be a measurable increase in background levels [of substances] at the downstream edge of the mixing zone for some parameters. A few thousand feet downstream of the mixing zone, the Kinross discharge would not be measurable.

B. "As required by section (3)(a) of OAR 340-41-026, the Department has determined that (A) the new discharge load would not cause water quality standards to be violated; (B) the new discharge load would not unacceptably threaten or impair any recognized beneficial uses; (C) the new

discharged load is not to a water quality limited stream; and (D) the activity is consistent with acknowledged local land use plans as evidenced by submission of a land use compatibility statement to the Department.

C. "A non-discharge alternative such as spray irrigation is not viable because of the steep terrain and because irrigation would be during the wet weather season. Since the proposed mine is located on a steep hill side in the Willamette National Forest, installing a irrigation system may not be practicable and may negatively impact both surface water and groundwater quality. Furthermore, spray irrigation would primarily be during the wet weather season when the capacity of the soil to assimilate the waste water is at a minimum. Irrigating under these conditions would increase run-off and impact surface waters. These conditions would not lend themselves to a non-discharge alternative such as spray irrigation.

D. "[D]ue to the heavy precipitation in the area and the potential for encountering high volumes of groundwater during the mining operation, Kinross would not be able to develop and operate the mine without a NPDES waste discharge permit."

9. (Defendant denies both the accuracy and the relevancy of the following facts.) In February 1995, EQC

amended the Three Basin Rule to permit some types of nonindustrial wastewater discharges but added a new provision to the rule making it applicable to WPCF permits and prohibiting discharges from industrial sources that have any measurable effect on surface water.

OAR 340-41-470(7)(b)(B).

10. On March 21, 1995, DEQ denied plaintiff an NPDES permit because OAR 340-41-470 (the Three Basin Rule) does not allow for the discharge of any industrial process water within the waters of the North Santiam River Subbasin. On April 7, 1995, plaintiff requested a contested case hearing before EQC on the denial of its application. On August 30, 1996, EQC issued a final order denying plaintiff's application for an NPDES permit.

11. To date plaintiff and its predecessors have spent a substantial amount of money on exploration,

development, and permitting costs for the Bornite Project since the claims were staked in 1975.

12. (Defendant denies both the accuracy and relevancy of the following, unless the words "as designed" are inserted after the word mine.) DEQ's denial of the NPDES permit application prevents plaintiff from developing the mine and has deprived plaintiff of all economically beneficial or productive uses of its mining claims.

/S/ Phillip D. Chadsey
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiff

Dated: March 27, 1997

/S/ Denise G. Fjordbeck
Denise G. Fjordbeck, OSB No. 82257
Of Attorneys for Defendant

Dated: March 27, 1997

CLEAN WATER ACT

40 CFR §440.104(b)(2)(i) (1999)
New source performance standards (NSPS)

(2)(i) In the event that the annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility exceeds the annual evaporation, a volume of water equal to the difference between annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility and annual evaporation may be discharged subject to the limitations set forth in paragraph (a) of this section.

LAND USE PLANS

43 USC §1712(c)(8) (West 1986)

(c) Criteria for development and revision.

In the development and revision of land use plans, the Secretary shall:

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans.

THREE BASIN RULE (as originally adopted)

OAR 340-41-470

(1) In order to preserve the existing high quality water for municipal water supplies and recreation, it is the policy of the EQC to prohibit any further waste discharges to the waters of:

(a) The Clackamas River Subbasin;

(b) The McKenzie River Subbasin above the Hayden Bridge (river mile 15);

(c) The North Santiam River Subbasin.

(2) The Environmental Quality Commission shall investigate, together with any other affected state agencies, the means of maintaining at least existing minimum flow during the summer low flow period.

THREE BASIN RULE (as amended)

OAR 340-041-0470(1)-(7)

(1) In order to preserve or improve the existing high quality water for municipal water supplies, recreation, and preservation of aquatic life, new or increased waste discharges shall be prohibited, except as provided by this rule, to the waters of:

(a) The Clackamas River Subbasin;

(b) The McKenzie River Subbasin above the Hayden Bridge (river mile 15);

(c) The North Santiam River Subbasin.

(2) Except as otherwise provided for in this rule, this rule becomes effective and applies to all permits pending or applied for after the date of filing with the Secretary of State. For purposes of sections (1) through (7) of this rule, the following definitions apply:

(a) "Waste Discharges" are defined to mean any discharge that requires and NPDES permit, WPCF permit, or 401 Certification. Individual on-site sewage disposal systems subject to issuance of a construction-installation permit; domestic sewage facilities that discharge less than 5,000 gallons per day under WPCF permit; biosolids land applied within agronomic loading rates pursuant to OAR Chapter 340, Division 50; and reclaimed domestic waste water land applied at agronomic rates pursuant to OAR Chapter 340, Division 55 are excluded from this definition;

(b) "Existing Discharges" are defined as those discharges from point sources which existed prior to January 28, 1994;

(c) "Existing Facilities" are defined as those for which construction started prior to January 28, 1994. Where existing facilities are exempted from requirements placed on new facilities, the exemption applies only to the specific permit(s) addressed in the subsection which allows the exemption;

(d) "New" NPDES and WPCF permits are defined to include permits for potential or existing discharges which did not previously have a permit, and existing discharges which have a permit, but request an increased load limitation;

(e) "Agronomic Loading Rate" means the application of biosolids or reclaimed effluent to the land at a rate which is designed to:

(A) Provide the quantity of plant nutrients, usually nitrogen, needed by a food crop, feed crop, fiber crop, cover crop or other vegetation grown on the land; and

(B) To minimize the quantity of nitrogen or other nutrients from the land applied materials that passes below the root zone of the crop or vegetation grown on the land to groundwater.

(f) "Biosolids" means solids derived from primary, secondary, or advanced treatment of domestic wastewater which have been treated through one or more controlled processes that significantly reduce pathogens and reduce volatile solids or chemical stabilize solids to the extent that they do not attract vectors. This term refers to domestic wastewater

treatment facility solids that have undergone adequate treatment to permit their land application;

(g) "Reclaimed Wastewater" means treated effluent from a domestic wastewater treatment system which, as a result of treatment, is suitable for a direct beneficial purpose or a controlled use that could not otherwise occur.

(3) To respond to emergencies or to otherwise avoid imminent serious danger to public health or welfare, the Director or designee may allow lower water quality on a short-term basis.

(4) The Director or a designee may renew or transfer NPDES and WPCF permits for existing facilities. Existing facilities with NPDES permit may not be granted increases in their permitted mass load limitations. The following restrictions and exceptions apply:

(a) The Department shall conduct an inspection prior to permit renewal. Existing sources with general permits who are found not to qualify for a general permit, and who wish to continue discharging, shall be required to apply for an individual permit;

(b) Fish hatcheries (General Permit 300) and log ponds (General Permit 400) shall be required to apply for an individual permit at the time of permit renewal;

(c) Additional industrial, confined animal feeding operations, or domestic waste loads that are irrigated on land at agronomic rates or that otherwise meet the conditions of section (7) of this rule shall not be considered an increase in the permitted wasteload.

(5) The Director or a designee may issue the following General Permits or Certifications subject to the conditions of the Permit or Certification:

(a) Storm water construction activities (General Permits 1200C and 1200CA);

(b) Underground storage tank cleanups using best available treatment technology (General Permit 1500);

(c) Non-contact cooling water (General Permit 100);

(d) Filter backwash (General Permit 200);

(e) Boiler blowdown water (General Permit 500);

(f) Suction dredging (General Permit 700) only in portions of the basins that are not designated as Scenic Waterways under ORS 390.805 to 390.925;

(g) Federal Clean Water Act Section 401 water quality certifications;

(6) Long-term general and individual storm water permits may be allowed as required by State and/or Federal law. The following requirements apply:

(a) New storm water discharge permittees shall maintain a monitoring and water quality evaluation program which is effective in evaluation of the in-stream water quality impacts of the discharge; and

(b) When sufficient data is available to do so, the Department shall assess the water quality impacts of storm water discharges. Within a subbasin, if the proportion of total degradation that is contributed by the storm water is determined to be significant compared to that of other permitted sources, or if the Department determines that reducing degradation due to storm water is cost-effective when compared to other available pollution control options, the Department may institute regulatory mechanisms or modify permit conditions to require control technologies and/or practices which result in protection that is greater than that required statewide.

(7) Industrial waste discharge sources, confined animal feeding operations, and domestic sewage treatment facilities shall meet the following conditions:

(a) No NPDES permits for new industrial or new confined animal feeding operation waste discharges, or new domestic sewage treatment facilities shall be issued, except as allowed under section (3), (4), (5), and (6) of this rule;

(b) The Department may issue WPCF permits for new industrial or confined animal feeding operation waste discharges provided;

(A) There is no waste discharge to surface water; and

(B) All groundwater quality protection requirements of OAR 340-040-0030 are met. Neither the Department nor the Commission shall grant a concentration limit variance as provided in OAR 340-040-0030, unless the Commission finds that all appropriate groundwater quality protection requirements and compliance monitoring are met and

there will be no measurable change in the water quality of the surface water that would be potentially affected by the proposed facility. For any variance request, a public hearing shall be held prior to Commission action on the request.

(c) The Department may issue WPCF permits for new domestic sewage treatment facilities provided there is no waste discharge to surface water and provided:

(A) All groundwater quality protection requirements of OAR 340-040-0030 are met. Neither the Department nor the Commission shall grant a concentration limit variance as provided in OAR 340-040-0030, unless the Commission finds that all appropriate groundwater quality protection requirements and compliance monitoring are met and there will be no measurable change in the water quality of the surface water that would be potentially affected by the proposed facility. For any variance request, a public hearing shall be held and the permit application will be evaluated according to paragraphs (B) and (C) of this subsection;

(B) The Commission finds that the proposed, new domestic sewage treatment facility provides a preferable means of sewage collection, treatment and disposal as compared to individual on-site sewage disposal systems. To be preferable, the Commission shall find that one of the following criteria applies:

(i) The new sewage treatment facility will eliminate a significant number of failing individual on-site sewage disposal systems that cannot be otherwise reliably and cost-effectively repaired; or

(ii) The new sewage treatment facility will treat domestic sewage that would otherwise be treated by individual on-site sewage disposal systems, from which the cumulative impact to groundwater is projected to be greater than that from the new facility; or

(iii) If an individual on-site sewage disposal system, or several such systems, would not normally be utilized, a new sewage treatment facility may be allowed if the Commission finds that the social and economic benefits of the discharge outweigh the possible environmental impacts.

(C) Applicants for domestic wastewater WPCF permits must meet the following requirements:

(i) Application must be for an individual permit; and

(ii) The proposed discharge must not include wastes that incapacitate the treatment system; and

(iii) The facility must be operated or supervised by a certified wastewater treatment plant operator as required in OAR 340-049-0015, except as exempted by ORS 448.430; and

(iv) Annual written certification of proper treatment and disposal system operation shall be obtained from a qualified Registered Sanitarian, Professional Engineer, or certified wastewater treatment system operator.

Supreme Court, U.S.
FILED
OCT 17 2000
OFFICE OF THE CLERK

(3)

No. 00-431

In the

Supreme Court of the United States

KINROSS COPPER CORPORATION,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. When an unpatented mining right protected by federal law is abrogated by a state regulation prohibiting discharge of nonpolluting mine waters, does a taking occur under the Fifth Amendment's Takings Clause?

2. Is a state regulation that prohibits the discharge of nonpolluting mine waters, and thus prevents an unpatented mining claim on federal lands from being developed, preempted by federal law?

3. Does takings jurisprudence require a property owner to show that it has a property interest in the very thing the state seeks to regulate, rather than merely showing that the effect of the regulation as applied to the petitioner denies it all economic use of a federally recognized property right?

4. Can state court, under the guise of stating that the holder of an unpatented mining claim never had the right to appropriate water for the mine and, therefore, never had the right to discharge it as a part of its property right, thus avoid a "taking," when at common law it was not a nuisance for a miner to discharge nonpolluting mine waters into streams.

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INTEREST OF AMICUS CURIAE

For 26 years, amicus Pacific Legal Foundation (PLF) has been litigating in support of the right of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on two occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Suitum v. Tahoe Regional Planning Agency*, 502 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF attorneys will soon appear before this Court yet again on behalf of a property owner who, like petitioner here, is asserting a regulatory takings claim against a state government. *See Palazzolo v. Rhode Island*, No. 99-2047 (cert. granted on Oct. 10, 2000). Finally, PLF has participated as amicus curiae in virtually every major real property takings case heard by this Court in the past two decades.[1]

STATEMENT OF THE CASE

The relevant facts in this case are simple. In 1975, Amoco Minerals Company staked unpatented mining claims on federal land in the Willamette National Forest in Oregon. Two years later, a state agency issued the "Three Basin Rule," which prohibits "any new or increased waste[water] discharges" into the Clackamas, McKenzie, or North Santiam River Subbasins. In 1992, having leased the mining claims from Amoco, petitioner submitted to the Oregon Department of Environmental Quality an application to discharge groundwater into the latter subbasin as part of a plan for operating a copper mining project. More

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

specifically, the application sought a permit under the National Pollutant Discharge Elimination System (NPDES), the system established by the federal Clean Water Act and implementing state laws. *See* Petition Appendix (Pet. App.) at A–3 to –6.

The Department investigated the water quality aspects of petitioner's mining plan and expressly found that any discharge of water from petitioner's mine "would be well below the *most stringent* water quality standards, chronic toxicity. Therefore, water quality standards would not be violated and beneficial uses would be protected." *Id.* at I–6 (emphasis added). That is, petitioner proposed to discharge from its copper mine only water that met most stringent standards under federal and state clean water laws. Nevertheless, the Department denied petitioner's NPDES permit application solely "on the ground that the Three Basin Rule prohibits *any* new [water] discharges into the North Santiam River Subbasin." *Id.* at A–6.

After exhausting its administrative remedies, petitioner brought the instant inverse condemnation action in the Oregon courts, alleging that the denial of its permit application worked a compensable taking of private property under the federal and state constitutions, invoking this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Petitioner also argued in the state courts that the Three Basin Rule, as applied to petitioner's mining operations, was preempted by federal mining law. In the decision under review, the Oregon Court of Appeals rejected both arguments.

SUMMARY OF ARGUMENT

Certiorari is warranted on at least two grounds. First, the Oregon court correctly found that the application of the Three Basin Rule to petitioner's proposed copper mining operation would deny all economically viable use of petitioner's mining property, so as to invoke *Lucas*'s categorical rule that total regulatory takings must be compensated. But the court incorrectly applied *Lucas*'s "background principles" exception in requiring

petitioner to prove that it had a "right" to discharge clean water into a public waterway. *Lucas* itself makes clear that it is the government, not the property owner, that bears the burden to establish the existence of background principles sufficient to overcome the categorical rule, and several lower courts are in conflict with the court below on just that point. In the present case, the government did not even attempt to satisfy its burden, and had it attempted, it would surely have failed. Nothing in the common law of property or nuisance even suggests that a property owner could be enjoined from discharging clean water into a public waterway.

Second, the application of the Three Basin Rule to petitioner's proposed operations effectively prohibited petitioner from working its federal mining claims on federal land. This Court has implicitly held that any state-law prohibition against mining on federal lands is preempted by federal mining laws. In rejecting the argument that the Three Basin Rule as applied to petitioner was so preempted, the Oregon court contributed to a split on this issue among the lower courts.

ARGUMENT

I

THE OREGON COURT FUNDAMENTALLY MISAPPLIED THE "BACKGROUND PRINCIPLES" EXCEPTION OF *LUCAS*, EXACERBATING A CONFLICT IN THE LOWER COURTS

As set forth above, petitioner submitted an "application for an NPDES permit as a precondition to conducting a copper mining operation." Pet. App. at A–14. Solely on the basis of its Three Basin Rule, the Oregon Department of Environmental Quality denied the application. *See id.* at A–6. The parties stipulated—and the court below accepted—that "the effect of the denial deprives [petitioner's] unpatented mining claims of all of their economic value." *Id.* at A–14. Consequently, the court below recognized that petitioner had properly invoked the

rule that a regulatory takings claim may be maintained "against a government agency that has taken action that has deprived the owner of 'all economically beneficial use' of the property." *Id.* at A–12 (citing *Lucas*).

Nonetheless, the Oregon court dismissed petitioner's regulatory takings claim. In so doing, it relied on the "background principles" exception enunciated in *Lucas*. That exception is an exception to the otherwise "categorical rule that total regulatory takings must be compensated." 505 U.S. at 1026. *Lucas* gave the government but a single escape from this obligation: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. In other words, the government can avoid paying compensation for land-use limitations that otherwise amount to categorical takings only if those limitations on use "inhere in the title itself, in the restrictions that *background principles* of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029 (emphasis added).

In applying *Lucas*'s background principles exception to the present case, the Oregon court did ***not*** require the government to show that petitioner's discharge of water into a river would constitute a nuisance or other conduct that was "*always* unlawful" under state law. *Lucas*, 505 U.S. at 1030 (emphasis in original). Nor did the lower court consider in any fashion whatever "the degree of harm to public lands and resources, or adjacent private property, posed by [petitioner's] proposed activities, the social value of the [petitioner's] activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided." *Id.* at 1030-31 (citations omitted). No, the lower court instead required *petitioner* to "show that the denial of its NPDES permit application deprived it of a property right"; in other words, petitioner "must

show that it had *a right to discharge its wastewater into a river of the state*." Pet. App. at A–15 (emphasis added).

Ultimately, the Oregon Court of Appeals concluded that petitioner "never possessed" such a right. *Id.* at A–28. As the court explained, when petitioner's "unpatented mining claims came into existence [in 1976], no water rights"—i.e., rights to *appropriate* water—"were conferred with them." *Id.* at A–26. Thus, reasoned the court, if petitioner "has a private property right to discharge wastewater into the publicly owned waters of the state, the right must have come into existence separately after compliance with state law regarding the creation and recognition of state water rights." *Id.* But "[t]here is no evidence in the record . . . that [petitioner] has obtained a water rights permit or certificate after complying with the requirements of the statutory permit process." *Id.* Therefore, stated the court, "in denying [petitioner's] application for a permit to conduct that [discharge of unpolluted water], the state has not effected a taking of private property." *Id.* at A–28.

In so applying the background principles exception enunciated in *Lucas*, the lower court gravely erred. As explained below, the Oregon court improperly excused the government from its burden to establish the existence of a background principle sufficient to overcome the government's otherwise categorical duty to pay compensation for confiscatory regulations of private property.

A. The Government, Not the Property Owner, Has the Burden to Establish the Existence of Background Principles Under *Lucas*

When it is established—as it has been here—that a regulation has deprived an owner of all economically viable use of his property, who bears the burden of proof as to whether that deprivation is justified by any background principles of state property and nuisance law? As set forth below, we submit that *Lucas* makes it plain that the government bears this burden.

Recall that the "categorical rule" is that "total regulatory takings must be compensated." *Lucas*, 505 U.S. at 1026. Any "departure" from this categorical rule requires "justification," *id.*, and the only valid justification is that the regulation "do[es] no more than duplicate the result that could have been achieved in the courts" by adjacent landowners or by the State under the law of nuisance, *id.* at 1029. Just who has to show that other property owners or the state could have achieved this result? *Lucas* did not leave us guessing. In concluding that the background principles/nuisance issue "is one of state law to be dealt with on remand," the Court explicitly set forth what must be proved and, more importantly here, who must prove it: "We emphasize that to win its case, . . . *South Carolina* must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." *Id.* at 1031 (emphasis added). That is, *the government* has the burden to come forward with background principles that would prohibit the use desired by the property owner.

In contrast to the court below, several lower courts have faithfully applied the foregoing framework for resolving regulatory takings claims that implicate the background principles exception. Foremost among these is the United States Court of Appeals for the Federal Circuit. In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), for example, the government defended its denial of a permit to fill wetlands—a denial that deprived the plaintiff of all economically viable use of its property—on the ground (among others) that "allowing the fill would constitute a nuisance." *Id.* at 1182. The Federal Circuit placed the burden of proof as to this issue squarely on the government: "The trial court concluded that the Government had failed to carry its burden of showing that [nuisance] law could have been invoked to prevent the fill. Our review of the record leads us to the same conclusion." *Id.* at 1183. Thus, the court of appeals affirmed an award of compensation for a

taking of the plaintiff's property. Earlier this year, the Federal Circuit reaffirmed that *Lucas* requires the government, not the property owner, to identify the relevant background principles: "it is clear that in order to assert a defense under the navigational servitude, the Government must show that the regulatory imposition was for a purpose related to navigation; absent such a showing, it will have failed to 'identify background principles . . . that prohibit the uses [the landowner] now intends.'" *Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000) (quoting *Lucas*, 505 U.S. at 1031).

Also in contrast to their Oregon counterparts, the courts of Washington state have correctly applied *Lucas*'s background principles exception. Thus, in *Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993), *cert. denied*, 510 U.S. 1176 (1994), the Washington Supreme Court undertook a comprehensive review of takings law and procedure in light of the then-recent decision in *Lucas*. *Guimont* held that, at the outset of a regulatory takings case, "the landowner must have the opportunity to prove . . . that the regulation . . . denies all economically viable use of the property." *Id.* at 10. If the landowner proves this denial, "the State will then have the opportunity to rebut this claim by identifying common law principles of state nuisance and property law that prohibit the uses the landowner now intends in the circumstances in which the property is presently found." *Id.* Accordingly, "[i]f the landowner proves a 'total taking' . . . has occurred, *and if the State fails to rebut that claim*, the owner is entitled to categorical treatment under *Lucas*," that is, payment of compensation. *Id.* (emphasis added); *accord, e.g., Manufactured Housing Communities v. State*, 951 P.2d 1142, 1148 (Wash. Ct. App. 1998) (holding that an owner whose property is subjected to a total regulatory taking is entitled to compensation "unless the State provides rebuttal evidence showing that the use violates nuisance or property laws"); *see also City of St. Petersburg v. Bowen*, 675 So. 2d 626, 630 (Fla. Dist. Ct. App. 1996) ("In order to prevail on its affirmative defense of

the nuisance exception [under *Lucas*], the City has the burden of proving that . . . ."), *cert. denied*, 520 U.S. 1110 (1997).

Obviously, the decision below cannot be reconciled with *Lucas* or the other decisions cited above. Whereas *Lucas* held that "*South Carolina* must identify background principles," 505 U.S. at 1031 (emphasis added), the decision below stated that "*plaintiff* [petitioner] must show that the denial of its NPDES permit application deprived it of a property right," Pet. App. at A–15 (emphasis added). Whereas the Federal Circuit placed on the government the "burden of showing that [nuisance] law could have been invoked to prevent" the property owner's proposed activity, *Loveladies Harbor*, 28 F.3d at 1183, the court below placed on petitioner the burden of "show[ing] that it had a right" to engage in the proposed activity, Pet. App. at A–15. Whereas the Washington courts award compensation for total regulatory takings "unless the State provides rebuttal evidence showing that the [proposed] use violates nuisance or property laws," *Manufactured Housing*, 951 P.2d at 1148, the Oregon courts deny compensation for total regulatory takings even if there is "no evidence in the record" as to whether the proposed use is lawful or not, Pet. App. at A–26.

B. The Government Did Not Even Attempt to Satisfy Its Burden in the Present Case, Nor Could It

Under *Lucas*, Oregon had the burden to "identify background principles of nuisance and property law that prohibit the uses [petitioner] now intends in the circumstances in which the property is presently found." *Id.* at 1031. Specifically, the state had to show that its Three Basin Rule did "no more than duplicate the result that could have been achieved in the courts . . . under the State's law of . . . nuisance," *id.* at 1029, which is to say it had to show that the discharge of clean water into a public waterway was "*always* unlawful" under nuisance law, *id.* at 1030 (emphasis in original). So far as is revealed by the lower court's opinion, the state did not even attempt to make

this showing. Likewise, the court itself did not even intimate that petitioner's proposed drainage was in any way unlawful.[2]

It may be worth asking whether the state could have satisfied its burden had the state courts required it to do so. Could the state have obtained an injunction against petitioner's discharge of clean water into a public waterway? Under generally applicable background principles of property and nuisance law, the answer is *no*.[3]

In *North Dakota v. Minnesota*, 263 U.S. 365, 372 (1923), Chief Justice Taft wrote for a unanimous Court: "One owning land on a watercourse may by ditches and drains turn into it all the surface water that would naturally drain there, but he may not thus discharge into the watercourse more water than it has capacity to carry, and thus burden his lower neighbor with more than is reasonable." In support of this statement, Chief Justice Taft cited several state-court decisions, the most pertinent of which is *McCormick v. Horan*, 81 N.Y. 86 (1880). There, the highest court of New York opined:

> The interests of society are promoted by the cultivation and improvement of the soil, *the working of mines*, and by other industries connected with the use of land, and the rule of law does not prevent the use of water-courses for artificial drainage, *although the*

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[2] Except, of course, to point out that petitioner had not obtained a permit under the "statutory permit process," that is, the process of which the Three Basin Rule is a part. Pet. App. at A–26. It should be obvious that a use of property is not demonstrated to be "*always* unlawful" merely because that use violates the very regulation that is under constitutional attack.

[3] Of course, the law of any particular state might depart from general common-law principles, but the state court did not cite, nor are we independently aware of, any Oregon authorities that depart from the authorities discussed in the text.

> *volume of the stream is thereby somewhat enlarged*, and the water is discharged at a different time or manner from what it would be if the land was kept in a state of nature, provided no material injury is occasioned to other riparian owners.

Id. at 90 (emphasis added). Other state courts are in accord.[4]

The rule that clearly emerges from these decisions is that discharging water by artificial means for industrial purposes,

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[4] *See, e.g., Jackman v. Arlington Mills*, 137 Mass. 277, 283 (1884) (holding that an owner has the right to collect and discharge water into "the natural outlet of the waters thus collected, even although, by this artificial arrangement, the flow of the waters is accelerated, and the volume at times is increased, provided that this is done in the reasonable use of his own land, and that the discharge is not beyond the natural capacity of the watercourse, and the land of a riparian owner is not thereby overflowed, and materially injured"); *Tillotson v. Smith*, 32 N.H. 90, 95 (1855) ("In short, if any person, above or below, shall make any change in the natural flow of a stream, to the material injury of the owner situate upon it, . . . he is liable for the damage he may occasion."); *Mayor of Baltimore v. Appold*, 42 Md. 442, 456-57 (1875) ("Of course we are not to be understood as meaning there can be no diminution or increase of the flow whatever, for that would be to deny any valuable use of it. . . . The limits which separate the lawful from the unlawful use of a stream, it may be difficult to define. . . . It is entirely a question of degree, the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others."); *Baldwin v. Ohio Township*, 78 P. 424, 426 (Kan. 1904) ("The owner of land has a right to discharge the natural drainage of his land, and the surface-water accumulating thereon, into a watercourse, whereby it becomes a part thereof, and in so doing he may change or concentrate its flow in artificial channels, thus accelerating the flow and increasing the volume of water in the stream, provided its natural capacity is not exceeded . . . .").

All of these decisions were cited with approval by the Court in *North Dakota v. Minnesota*. *See* 263 U.S. at 372.

including mining, is a reasonable use of land. So long as the water discharged does not, by virtue either of its quality or its quantity, cause injury to another, the law will not interfere with the discharge. In the present case, there is no suggestion that anyone, including the state, would suffer any injury from petitioner's proposed discharges of clean water. Indeed, the state Department of Environmental Quality specifically found that "water quality standards would not be violated and beneficial uses would be protected." Pet. App. at I–6. In these circumstances, the state cannot show that its Three Basin Rule did "no more than duplicate the result that could have been achieved in the courts . . . under the State's law of . . . nuisance." *Lucas*, 505 U.S. at 1029.

For all these reasons, the lower court fundamentally misapplied the background principles exception of *Lucas*. In so doing, the court exacerbated a conflict in the lower courts, a conflict that only this Court can resolve.

II

THE OREGON COURTS ALSO CONTRIBUTED TO A SPLIT IN THE LOWER COURTS AS TO WHETHER STATE PROHIBITIONS AGAINST MINING AND OTHER ACTIVITIES ON FEDERAL LANDS ARE PREEMPTED BY FEDERAL LAW

As applied in this case, the Three Basin Rule categorically foreclosed petitioner from obtaining an NPDES discharge permit for its proposed copper mine. Accordingly, the rule had the undisputed effect of prohibiting petitioner from developing its federal mining claims. *See* Pet. App. at I–7 (stipulation of the parties that without the discharge permit, petitioner "would not be able to develop and operate the mine"). In the state courts, petitioner argued that the Three Basin Rule "as applied in this case is preempted by federal mining and land use law." Pet. App. at G–5 (petition for review to Oregon Supreme Court). In rejecting petitioner's preemption argument, the Oregon courts

contributed to a split in the lower courts as to whether state or local prohibitions against mining or other activities on federal lands are preempted by state law.[5]

A. The Law of Federal Preemption with Respect to Mining Activity on Federal Lands

The standards governing federal preemption of state law are well established, though not well understood in some contexts by some courts. In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), this Court wrote:

> [E]ven where Congress has not entirely displaced state regulation in a particular field, state law is preempted when it actually conflicts with federal law. Such a conflict will be found when it is impossible to comply with both state and federal law, . . . or *where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.*

Id. at 300 (citations and internal quotation marks omitted and emphasis added). The present case implicates the latter kind of preemption.

What are the "full purposes and objectives of Congress" with respect to mining on federal lands? The answer is quite simple: it is the unambiguous intent of Congress to encourage and promote mining activities on federal land. *See Deffeback v. Hawke*, 115 U.S. 392, 401 (1885) (describing the 1872 mining law as an act "to promote the development of the mining

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[5] The issue of preemption is also relevant to petitioner's regulatory takings claim. It is elementary that a regulation effects a taking of private property for public use if it fails to "substantially advance a *legitimate* state interest." *E.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (emphasis added). Because a state regulation that is preempted by federal law is invalid, such a regulation can never advance a *legitimate* state interest.

resources of the United States"); *United States v. Coleman*, 390 U.S. 599, 602 (1968) ("Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense." (footnote omitted)); *Brubaker v. Board of County Commissioners*, 652 P.2d 1050, 1056 (Colo. 1982) (observing that "underlying purpose of the mining laws is to encourage exploration for and development of mineral resources on public lands").

Congressional statements of policy subsequent to the 1872 mining law confirm that Congress continues to support and encourage the development of mineral resources on federal lands. For example, in the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a, Congress declared that "it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries." This goal was reaffirmed in the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(12), and in the National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. §§ 1601, 1602, 1605.

This Court addressed federal preemption with respect to mining in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), which held that the Coastal Commission could impose its regulatory permitting requirement upon the operation of Granite Rock's unpatented federal mining claims within the Las Padres National Forest. Importantly, this Court observed that federal statutes and regulations *contemplated and respected* the existence of state environmental regulations. *See id.* at 583-84. But the Court did so only on the explicit understanding that such regulation did not *prohibit* the development of the mining claims and that such regulation was not designed

to undercut the decisionmaking authority of the United States Forest Service. *See id.* at 586.

Indeed, this Court was explicit and emphatic in its understanding that the California Coastal Commission did not seek to *ban* the mining activity:

> In the present case, the Coastal Commission has consistently maintained that it does not seek to prohibit mining of the unpatented claim on national forest land. See 768 F. 2d, at 1080 ("The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal land *unless the regulation prohibits mining altogether* . . .") (emphasis supplied).

480 U.S. at 586. This passage is followed by an extensive collection of record cites showing that the Coastal Commission eschewed the authority to prohibit mining activity. This fact is important because *Granite Rock* distinguished mere permitting and other environmental requirements from those that sought to prohibit certain uses or otherwise dictate land use choices on federal lands: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* at 587.

B. The Lower Courts Are Split as to Whether State and Local Governments Can Prohibit Mining and Other Activities on Federal Lands

Notwithstanding *Granite Rock* and despite the clear intent of Congress to *encourage* mining on certain federal lands, the lower courts are in conflict as to whether state and local governments can prohibit such mining without running afoul of the preemption doctrine.

The most telling case is *South Dakota Mining Association v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998). There, the voters of Lawrence County, South Dakota, adopted an ordinance that prohibited all new or expanded surface metal mining on 40,000 acres of the county. *Id.* at 1007. After noting that surface metal mining is the only viable method of extracting gold and silver deposits in this area, the Eighth Circuit concluded that the ordinance effectively constituted a "per se ban on all new or amended permits for surface metal mining." *Id.* at 1011. After reciting the congressional intent behind the federal mining laws, the court concluded:

> The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act. . . . A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. The ordinance is prohibitory, not regulatory, in its fundamental character. The district court correctly ruled that the ordinance was preempted.

Id.

The Colorado Supreme Court reached a similar result in *Brubaker v. Board of County Commissioners*, ruling that the Board of El Paso County was preempted from refusing to grant a special use permit for oil drilling on federal land because the operations had already been approved by the federal government. In the face of assertions by the county that it was merely conditioning development on compliance with reasonable legislative standards, the court found preemption because the board had applied its local zoning ordinances to prohibit a federally authorized use of federal property. *See* 652 P.2d at 1054-56.

Boundary Backpackers v. Boundary County, 913 P.2d 1141 (Idaho 1996), yielded a similar result in a non-minerals context. The Board of Commissioners of Boundary County had adopted an ordinance purporting to give the county veto power over federal agency land management decisions that related to, among other laws, the Clean Water Act, Endangered Species Act, Wild and Scenic Rivers Act, and Wilderness Act of 1964. *See id.* at 1144-45. Relying on *Granite Rock*, the Idaho Supreme Court had no difficulty in concluding that the county's prohibitory regulation was preempted by federal law. *See id.* at 1146-48.

In conflict with these opinions are the opinion below and *Le Faivre v. Environmental Quality Council*, 735 P.2d 428 (Wyo. 1987), both of which involved prohibitions on the development of federal mining claims. In *Le Faivre*, the court first upheld a prohibition of the development of a federal mining claim located on a scenic natural rock formation because reclamation was impossible once "the area is destroyed by cutting up and hauling away the . . . rock formation." *Id.* at 434.[6] The court found that the prohibition was not preempted because federal law contemplated concurrent state regulation of the mining claims. *Id.* Despite the court's assertion that its decision was "consistent" with *Granite Rock*, *see* 735 P.2d at 434 n.3, it clearly was not, given the prohibitory nature of the state regulation.

These various decisions about federal preemption cannot be reconciled. Only this Court can resolve this conflict.

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[6] Interestingly, in *Granite Rock*, the objection to the mining operation was that it would mine a scenic mountain. *See Granite Rock Co. v. California Coastal Commission*, 590 F. Supp. 1361, 1366 (N.D. Cal. 1984). But of course, the Coastal Commission never prohibited the operation or denied a permit. *See* 480 U.S. at 586.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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